Sazali bin Salleh lwn Pendakwa Raya

MAHKAMAH TINGGI (IPOH) — RAYUAN JENAYAH NO 41A–3 TAHUN 2002
VT SINGHAM H
24 MAC 2004

Acara Jenayah — Perbicaraan — Penukaran majistret — Sama ada majistret kedua boleh menukarkan dokumen yang ditanda sebagai ID oleh majistret pertama kepada keterangan yang boleh diterima — Kanun Acara Jenayah s 261

Acara Jenayah — Perbicaraan — Penukaran majistret — De novo — Sama ada majistret kedua harus memberi alasan kenapa beliau tidak menggunakan budi bicaranya untuk mendengar kes semula — Kanun Acara Jenayah s 261

Acara Jenayah — Perbicaraan — Penukaran majistret — Sama ada kelewatan oleh majistret kedua untuk memberi keputusan memprejudiskan perayu

Acara Jenayah — Perbicaraan — Ulang bicara — Bila tidak harus diperintahkan

Rayuan ini adalah terhadap keputusan Mahkamah Majistret Sitiawan. Dalam perbicaraan di mahkamah majistret, ada banyak dokumen-dokumen yang dikemukakan oleh pendakwaan di mana majistret pertama yang mendengar kes tersebut telah mengekalkan sebahagiannya sebagai ID sahaja dan tidak dijadikan eksibit. Selepas pendakwaan menutup kes pada 23 Ogos 2001, dan kes ditangguhkan untuk hujahan oleh kedua-dua pihak, majistret berkenaan telah pun ditukarkan ke jawatan timbalan pendakwa raya. Majistret yang menggantikan majistret pertama setelah membaca hujahan bertulis, ikatan otoriti dan keterangan yang direkodkan oleh majistret terdahulu telah memerintahkan pada 13 September 2002 (selepas setahun) bahawa perayu membela diri di atas pertuduhan tersebut. Perayu memilih untuk berdiam diri dan tidak mengemukakan sebarang keterangan. Perayu didapati bersalah, disabit dan dijatuhkan hukuman penjara berkenaan dengan tuduhan pilihan di bawah s 402 Kanun Keseksaan oleh majistret kedua. Perayu tidak berpuas hati tentang sabitan dan hukuman dan telah memfailkan rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Majistret kedua telah tersilap dari segi undang-undang apabila menukarkan dokumen-dokumen yang ditandai sebagai ID kepada keterangan yang boleh diterima dan ini mengakibatkan satu ketidakadilan telah berlaku terhadap perayu di mana keputusan oleh Majistret kedua telah prejudiskan perayu (lihat perenggan 6).

(2) Majistret kedua harus memberi alasan kenapa beliau tidak menggunakan budi bicara untuk mendengar kes semula (de novo) seperti di peruntukan di bawah s 261 Kanun Acara Jenayah (lihat perenggan 37).

(3) Satu tahun untuk memberi keputusan oleh majistret kedua selepas pendakwaan menutup kes di hadapan majistret pertama adalah satu tempoh yang tidak munasabah dan ini telah memprejudiskan perayu dan perayu harus diberi manfaat (lihat perenggan 84).

(4) Adalah tidak adil untuk perayu menjalankan perbicaraan kali ketiga kerana: (a) perayu telah pun menghadapi perbicaraan sebanyak dua kali di hadapan tiga majistret yang berlainan; (b) 10 tahun telah berlalu sejak tarikh kesalahan; (c) perbelanjaan orang awam akan menambah; (d) ulang bicara akan mencatat satu distress dan membawa kesulitan kepada 15 orang saksi pendakwaan;(e) ia akan membawa ketidakadilan yang serius terhadap perayu; dan (f) kepentingan keadilan tidak memerlukan satu ulang bicara diadakan (lihat perenggan 96).

[**English summary**

This is an appeal against the decision of Sitiawan Magistrate court. In the magistrate court trial many documents were adduced by the prosecution some of which the first magistrate who heard the matter marked as ID only and did not convert to exhibits. After the close of the prosecution's case on 23 August 2001, and the matter was adjourned for submissions by both parties, the magistrate was transferred to the position of deputy public prosecutor. The magistrate who replaced the first magistrate, after reading the written submissions, bundles of authorities and evidence recorded by the first magistrate, ordered on 13 September 2002 (after one year), that the appellant enter a defence to the charge. The appellant was then found guilty, convicted and sentenced to imprisonment for the alternative charge under s 403 of the Penal Code by the second magistrate. The appellant, dissatisfied with the conviction and sentencing, filed this appeal.

Held, allowing the appeal:

(1) The second magistrate erred in law when he converted the documents marked as ID to admissible evidence and this was unjust to the appellant as the second magistrate's decision prejudiced the appellant (see para 6).

(2) The second magistrate must explain why he failed to use his discretion to hear the case again (de novo) as provided for under s 261 of the Criminal Procedure Code (see para 37).

(3) One year to give a decision by the second magistrate after the close of the prosecution's case before the first magistrate was an unreasonable period and this has prejudiced the appellant and the appellant must be given the benefit of this (see para 84).

(4) It is not fair to the appellant to undergo the trial for the third time for the following reasons: (a) the appellant had undergone two trials before three different magistrates; (b) 10 years had passed since the date the offence was committed; (c) public expense will increase; (d) retrial will cause distress and will cause trouble to the 15 prosecution witnesses; (e) it will cause serious injustice to the appellant; and (f) it is not in the interests of justice to order a retrial (see para 96).]

Nota-nota

Untuk kes-kes mengenai penukaran majistret, lihat 5 *Mallal's Digest* (4th Ed, 2001 Reissue) perenggan 3836–3897.
Untuk kes-kes mengenai ulang bicara, lihat 5 *Mallal's Digest* (4th Ed, 2001 Reissue) perenggan 4198–4199

Kes-kes yang dirujuk

Anandagoda v The Queen [1962] 1 WLR 823 (dirujuk)
Aw Kew Lim & Ors v PP [1987] 2 MLJ 601 (dirujuk)
Baharom v PP [1960] MLJ 249 (dirujuk)
Balasingham v PP [1959] MLJ 193 (dirujuk)
Bhaskar @ Prabaskar & Ors v State represented by Inspector of Police, Vellore Taluk Police Station [2000] 2 LRI 803 (dirujuk)
Bolton v Bolton [1949] 2 All ER 908 (dirujuk)
British Reinforced Concrete Engineering Co Limited, In re Application of The Times, Friday, January 25 1929 (dirujuk)
Cheak Yoke Thong v PP [1984] 1 CLJ (Rep) 87 (dirujuk)
Chelliah v PP [1941] MLJ 17 (FMSR) (dirujuk)
Chong Kwee Hian v PP [1948] MLJ 191 (dirujuk)
Chua Chee Chor v Chua Kim Yang & Ors [1960] MLJ 127 (dirujuk)
Coleshill v Lord Mayor, Aldermen and Citizens of the City of Manchester [1928] 1 KB 776 (dirujuk)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (dirujuk)
Dyers v The Queen 210 CLR 285 (dirujuk)
Empress of India v Anand Sarup & Ors 1881 VOL III ILR 564 (dirujuk)
Ghazali bin Salleh & Anor v PP [1993] 3 CLJ 638 (dirujuk)
Goh Ah Yew v PP [1949] MLJ 150 (dirujuk)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (diikut)
Gunasekaran a/l Buchia v Pendakwa Raya[1995] 2 CLJ 397 (dirujuk)
Harjit Singh v Regina [1963] MLJ 287 (diikut)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (diikut)
Hj Ibrahim bin Wahab & satu yang lain v Peguam Negara & lain-lain [1995] 1 MLJ 493 (dirujuk)
Jayaraman & Ors v PP [1982] 2 MLJ 273 (dirujuk)
Juraimi bin Husin v PP [1998] 1 MLJ 537 (dirujuk)
Kartar Singh & Anor v Rex [1952] MLJ 85 (diikut)
Kay Hian Pte Ltd v Ma Boon Lan [2003] 4 MLJ 603 (diikut)
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505 (dirujuk)
Kumaraguru a/l N Muniandy & Ors v PP [1994] 2 CLJ 53 (dirujuk)
Lee Kok Nam v PP [1999] 5 CLJ 283 (dirujuk)
Lemanit v PP [1965] 2 MLJ 28 (dirujuk)
Ling Hock Tee v Goh Choon Moi [1965] 2 MLJ 167 (dirujuk)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (diikut)
Maleb bin Su v PP; Cheak Yoke Thong v PP [1984] 1 MLJ 311 (dirujuk)
Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya [1996] 3 MLJ 298 (dibeza)
Mohamed Idris bin Hj Mohamed Said v Rex [1949] MLJ 31 (dirujuk)
Mohd Amin bin Abdullah lwn Pendakwa Raya [1995] 1 MLJ 612 (dirujuk)

Mohd Din v PP [1985] CLJ (Rep) 582 (dirujuk)
Niranjan Singh Karam Singh Punjabi v Jitendra Bhimraj Bijja AIR 1990 SC 1962 (dirujuk)
Noliana bte Sulaiman v PP [2000] 4 MLJ 752 (diikut)
Oh Keng Seng v PP [1976] 1 MLJ 143 (dirujuk)
Ooi Lean Chai v PP [1991] 2 MLJ 552 (diikut)
Packiam & Anor v PP [1972] 1 MLJ 247 (dirujuk)
Pang Chee Meng v PP [1992] 1 MLJ 137 (diikut)
Pavone v PP [1984] 1 MLJ 77 (dirujuk)
PP v Chia Leong Foo [2000] 6 MLJ 705 (dirujuk)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (diikut)
PP v Goh Chooi Guan [1978] 2 MLJ 169 (diikut)
PP v Ishak Hj Shaari & other appeals [2003] 3 CLJ 843 (dirujuk)
PP v Kulasingam [1974] 2 MLJ 25 (dirujuk)
PP v Lin Lian Chen [1991] 1 MLJ 316 (dibeza)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702 (dirujuk)
PP v Mohd Jon [1993] 1 MLJ 133 (dirujuk)
R v Edwards [1997] 94 A Crim R 204 (dirujuk)
R v GK [2001] NSWCCA 413 (dirujuk)
Rogers v The Queen (1994) 181 CLR 25 (dirujuk)
Rosli bin Supardi v PP [2002] 3 MLJ 256 (dirujuk)
Satvinder Singh v PP [1987] 1 MLJ 500 (dirujuk)
Sia Geok Hee & Ors v PP [1995] 2 CLJ 841 (dirujuk)
Sia Soon Suan v PP [1966] 1 MLJ 116 (dirujuk)
Tan Boon Kean v PP [1995] 3 MLJ 514 (dirujuk)
Tan Hun Wah and another appeal v PP [1994] 1 MLJ 382 (dirujuk)
Teay Wah Cheong v PP [1964] MLJ 21 (dirujuk)
Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering) [1996] 5 MLJ 542 (diikut)
TN Nathan v PP [1978] 1 MLJ 134 (dirujuk)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (dirujuk)
Yusoff bin Kassim v PP [1992] 2 MLJ 183 (diikut)
Zahari bin Yeop Baai & Anor v PP [1980] 1 MLJ 160 (dirujuk)
Zamzuri bin Nazari v PP [1995] 4 CLJ 540 (dirujuk)

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 s 39B(1)(a)
Akta Keterangan 1950 ss 32, 73A
Akta Pencegah Rasuah 1961 s 4(c)
Akta Rayuan Jenayah 1912 [NSW] s 5A(2)
Kanun Acara Jenayah ss 173(h), 261(b), 307(i), 422
Kanun Keseksaan ss 403, 420
Ordinan Lalulintas 1958 s 34A

Naran Singh (Naran Singh & Co) bagi pihak perayu.
Azliza Bt Ali (Timbalan Pendakwa Raya) bagi pihak responden.

VT Singham H:

[1] Dalam rayuan ini, perayu telah dituduh di Mahkamah Majistret Sitiawan di atas pertuduhan seperti berikut:

Pertuduhan Pilihan

Bahawa kamu pada 23 Februari 1994 di Maybank Bhd Cawangan Batu Gajah di dalam Daerah Kinta Barat di dalam Negeri Perak sebagai penjawat awam iaitu sebagai Guru dan memegang jawatan Setiausaha Persatuan Ibu Bapa dan Guru di Sekolah Kebangsaan Toh Indera Wangsa Ahmad, Batu Gajah dan dengan curangnya menyalahgunakan harta, iaitu wang sejumlah RM6,680.85 kepunyaan Lembaga Pengurus Sekolah, Sekolah Toh Indera Wangsa Ahmad, Batu Gajah dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 403 Kanun Kesiksaan (FMS Cap 45)

[2] Dalam perbicaraan di mahkamah majistret, pendakwaan telah mengemukakan keterangan melalui 15 orang saksi dan seterusnya pendakwaan telah menutup kes pada 23 Ogos 2001. Dalam perbicaraan ada banyak dokumen-dokumen yang dikemukakan oleh pendakwaan di mana Majistret yang mendengar kes tersebut telah mengekalkan sebahagiannya sebagai ID sahaja iaitu untuk pengecaman dan bukan sebagai keterangan atau eksibit-eksibit pendakwaan. Sebelum pendakwaan menutup kes, tidak ada sebarang permohonan oleh pendakwaan kepada Mahkamah sama ada Majistret berkenaan ingin untuk mengkaji semula keputusannya terhadap dua puluh satu dokumen yang dikekalkan sebagai ID kecuali pendakwaan memohon dokumen-dokumen tersebut dikemukakan melalui pegawai penyiasat. Di sini mahkamah ini berpendapat bahawa sekiranya majistret pertama ingin menukar dokumen-dokumen tersebut sebagai keterangan yang boleh diterima dan ditanda sebagai eksibit P, beliau harus mendengar hujah-hujah lanjutan dan membuat keputusan sebelum pendakwaan menutup kes supaya keputusan beliau dibuat atas keseluruhan kes pendakwaan sama ada pendakwaan berjaya membuktikan pertuduhan terhadap tertuduh. Dalam kes ini Majistret berkenaan tidak berbuat sedemikian tetapi menangguhkan kes untuk hujah-hujah. Selepas pendakwaan menutup kes dan tangguhkan untuk hujah-hujah oleh kedua-dua pihak, majistret berkenaan telahpun ditukarkan ke jawatan timbalan pendakwa raya. Majistret yang menggantikan majistret asal mendengar kes di atas arahan oleh Ketua Pendaftar, Mahkamah Persekutuan untuk mengambil alih kes tersebut dan meneruskan perbicaraan.

[3] Majistret yang menggantikan majistret pertama setelah membaca hujah-hujah bertulis yang difailkan oleh kedua-dua pihak bersama-sama dengan ikatan otoriti di atas keterangan yang direkodkan oleh majistret terdahulu telah memerintahkan pada 13 September 2002 bahawa perayu membela diri di atas pertuduhan tersebut. Perayu memilih untuk berdiam diri dan tidak mengemukakan sebarang keterangan. Perayu didapati bersalah, disabit dan dijatuhkan hukuman penjara 12 bulan dari tarikh hukuman dan satu sebatan pada 13 September 2002 oleh majistret kedua. Perayu tidak berpuashati tentang sabitan dan hukuman dan telah memfailkan rayuan melalui notis rayuan bertarikh 16 September 2002 kepada Mahkamah Tinggi, Ipoh.

Rayuan Di Mahkamah Tinggi

[4] Setelah meneliti dan membaca rekod rayuan, keterangan-keterangan yang dirakamkan oleh majistret pertama yang bijaksana sehingga pendakwaan menutup kes pada 23 Ogos 2001, dokumen-dokumen yang boleh diterima iaitu, 'admissible documents' seperti diputuskan oleh majistret pertama, alasan-alasan penghakiman majistret kedua, serta setelah membaca hujah-hujah bertulis yang dikemukakan di mahkamah majistret dan mendengar hujah-hujah lisan oleh kedua-dua pihak iaitu peguam perayu dan timbalan pendakwa raya yang bijaksana bagi responden di mahkamah ini dan membaca bersama-sama otoriti-otoriti yang dikemukakan, mahkamah ini telah membenarkan rayuan, mengenepikan sabitan dan hukuman yang dijatuhkan terhadap perayu. Perayu telah dilepas dan dibebaskan. Alasan-alasan penghakiman Mahkamah ini adalah seperti berikut.

Sama Ada Majistret Kedua Yang Mengganti Majistret Pertama Boleh Mengubah Atau Mengenepikan Keputusan Untuk Mengekalkan Sebahagian Dokumen Sebagai Id Oleh Majistret Pertama Dan Menukarkan Dokumen-Dokumen Tersebut Sebagai Eksibit Dan Menjadikannya P

[5] Mahkamah ini mendapati bahawa majistret kedua telah: (a) memberi keputusan berdasarkan kepada keterangan-keterangan yang dirakamkan oleh majistret pertama di mana sepatutnya terdapat 15 orang saksi yang memberi keterangan tetapi majistret kedua hanya mengambil kira keterangan daripada 14 orang saksi; (b) menukarkan dua puluh satu dokumen yang ditanda sebagai ID kepada P dan sebagai keterangan yang boleh diterima di mana bantahan telah dibuat oleh peguambela bagi perayu di hadapan majistret pertama dan diputuskan untuk dikekalkan sebagai ID sahaja. Mahkamah ini berpendapat bahawa majistret kedua tidak mempunyai budi bicara untuk membuat keputusan sebaliknya dan menukarkan (convert) dokumen-dokumen yang diperintahkan oleh majistret pertama supaya dikekalkan sebagai ID untuk pengecaman sahaja kepada eksibit-eksibit yang boleh diterima. Mahkamah ini berpendapat bahawa sekiranya majistret kedua ingin membuat sesuatu keputusan terhadap dokumen-dokumen yang telah ditandakan dan diperintahkan untuk dikekalkan sebagai ID sebelum beliau mengambil alih perbicaraan itu, majistret kedua sepatutnya dan boleh menggunakan budi bicara untuk membuka semula kes pendakwaan kerana peguam bagi perayu dari awal di hadapan majistret pertama telah membantah dokumen-dokumen tersebut untuk diterima masuk sebagai eksibit dan dokumen-dokumen tersebut telah dikekalkan sebagai ID. Sekurang-kurangnya majistret kedua seharusnya mendengar hujah-hujah lanjutan di atas dokumen-dokumen tersebut sama ada dengan persetujuan oleh kedua-dua pihak iaitu peguam bagi perayu dan timbalan pendakwa raya bagi responden atau di atas inisiatif beliau sendiri. Pendek kata, majistret kedua yang ambil alih (succeeding magistrate) tidak seharusnya menukarkan (convert) atau menepikan (reverse) atau membuat keputusan sebaliknya (overrule) keputusan majistret pertama di mana pendakwaan telahpun menutup kes

selepas keputusan dibuat di atas dokumen-dokumen tersebut untuk ditandakan dan dikekalkan sebagai ID sahaja kecuali dengan mendengar dahulu hujahan lanjut daripada kedua-dua pihak. Dalam kes ini, sebahagian dokumen-dokumen yang dikekalkan sebagai ID oleh majistret pertama tidak mematuhi kaedah-kaedah keterangan (rules of evidence) dan seharusnya tidak diterima sebagai keterangan.

[6] Mahkamah ini berpendapat bahawa majistret kedua tidak mempunyai budi bicara atau kuasa untuk mengkaji semula keputusan (ruling) majistret pertama tentang dokumen-dokumen yang dikekalkan sebagai ID bagi pengecaman di mana pendakwaan telah menutup kes di hadapan majistret pertama kecuali majistret kedua menggunakan budi bicara untuk membuka semula kes pendakwaan. Dalam kes ini timbalan pendakwa raya yang bijaksana dengan jujur telah bersetuju bahawa dokumen-dokumen yang dikekalkan sebagai ID oleh majistret pertama bukanlah keterangan dan harus dikekalkan sebagai ID dan tidak diambil kira apabila membuat keputusan dan majistret kedua tidak mempunyai kuasa untuk membuat keputusan yang sebaliknya dan mengenepikan keputusan majistret pertama. Seterusnya, timbalan pendakwa raya juga dan dengan jujur telah berhujah bahawa sekiranya pendakwaan ingin mengguna pakai dokumen-dokumen yang ditandakan sebagai ID sebagai keterangan bagi kes pendakwaan di perbicaraan, pegawai pendakwa seharusnya memohon kepada mahkamah perbicaraan untuk ditandakan sebagai eksibit-eksibit pendakwaan sebelum pendakwaan menutup kes dan itupun sekiranya didapati kaedah-kaedah keterangan (rules of evidence) telah dipatuhi. Dalam keadaan itu, mahkamah ini berpendapat bahawa majistret kedua telah tersilap dari segi undang-undang apabila menukarkan dokumen-dokumen yang ditanda sebagai ID kepada keterangan yang boleh diterima dan ini mengakibatkan satu ketidakadilan telah berlaku terhadap perayu di mana keputusan oleh majistret kedua telah prejudiskan perayu.

Sama Ada Kandungan Dokumen-Dokumen Yang Dirampas Oleh Pegawai Penyiasat Di Peringkat Siasatan Boleh Diterima Sebagai Keterangan Melalui Pegawai Penyiasat Dan Ditanda Sebagai Eksibit P

[7] Mahkamah ini berpendapat bahawa pegawai penyiasat bukanlah pembuat dokumen-dokumen yang telah dirampas pada masa siasatan dijalankan atau daripada seorang suspek. Pendakwaan harus membuktikan kandungan dokumen-dokumen yang dirampas oleh pegawai penyiasat mengikut kaedah-kaedah keterangan (rules of evidence) dan pegawai penyiasat tidak boleh tiba-tiba menjadi pembuat dokumen-dokumen tersebut. Sebaliknya dan sekiranya, dokumen-dokumen tersebut boleh diterima pakai sebagai keterangan dan sekiranya keadaan memerlukan bahawa sebahagian dokumen-dokumen tersebut yang ditanda sebagai ID diterima pakai di bawah s 32 Akta Keterangan 1950, ini boleh diterima sekiranya kehendak-kehendak undang-undang dipatuhi tetapi dalam kes ini langkah-langkah yang sedemikian tidak diambil untuk mematuhi undang-undang dan peraturan di bawah s 32 Akta Keterangan 1950. Di sini mahkamah ingin menyatakan bahawa kes *Public Prosecutor v Lin Lian Chen*

[1991] 1 MLJ 316 yang dirujuk oleh timbalan pendakwa raya di mana keputusan tersebut disahkan oleh Mahkamah Agung di *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 harus dibezakan. Dalam kes *Public Prosecutor v Lin Lian Chen*, permohonan dibuat oleh peguam tertuduh untuk mengemukakan `percakapan amaran' tertuduh sendiri di peringkat kes pendakwaan semasa pegawai penyiasat memberi keterangan supaya pembelaan dapat menyangkal kes pendakwaan di peringkat kes pendakwaan. Di atas keadaan dan fakta-fakta kes tersebut, Mahkamah Tinggi membuat keputusan bahawa `percakapan amaran' tertuduh yang ada dalam simpanan pegawai penyiasat atau dalam kertas siasatan yang disimpan oleh pegawai penyiasat boleh dikemukakan melalui pegawai penyiasat dalam kes peringkat pendakwaan di atas permohonan peguam tertuduh kerana pembuat percakapan amaran tersebut adalah tertuduh sendiri dan boleh ditanda sebagai eksibit pembelaan. Oleh itu, prinsip atau keputusan dalam kes *Public Prosecutor v Lin Lian Chen* tidak boleh diluaskan atau dilanjutkan kepada semua dokumen-dokumen yang berada dalam simpanan atau kawalan pegawai penyiasat sebaliknya pembuat dokumen-dokumen tersebut harus dipanggil dan mengesahkan kandungannya seperti yang dikehendaki di bawah Akta Keterangan 1950 sekiranya kandungannya dapat diterima dan di atas perbandingan kes *Public Prosecutor v Lin Lian Chen* dengan kes di hadapan mahkamah ini.

[8] Dengan itu, hujah-hujah oleh pegawai pendakwa di mahkamah rendah bahawa pegawai penyiasat adalah pembuat dokumen-dokumen tersebut adalah satu tafsiran yang silap dari segi undang-undang (misconceived in law) dan tidak boleh diterima. Mahkamah ini berpendapat bahawa majistret kedua telah menepikan keputusan (ruling) majistret pertama tentang dokumen-dokumen berkenaan yang telah pun diperintahkan untuk dikekalkan sebagai ID di mana ia tidak diterima pakai sebagai keterangan. Seterusnya majistret kedua telah membuat keputusan yang sebaliknya dan ini telah menjejaskan (materially prejudiced) perayu seperti yang telah dinyatakan di bawah s 261(b) Kanun Acara Jenayah.

[9] Seksyen 261(b) Kanun Acara Jenayah menyatakan seperti berikut:

> 261 Change of Magistrate during hearing.
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> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may be order a new trial. (emphasis oleh Mahkamah ini)

[10] Dalam kes *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 di ms 66, Gopal Sri Ram HMR bagi Mahkamah Rayuan telah memutuskan:

> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in Harrison? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

[11] Keputusan dalam *Hartecon JV Sdn Bhd* telah diikuti oleh panel Mahkamah Rayuan yang lain dalam kes *Kay Hian Pte Ltd v Ma Boon Lan* [2003] 4 MLJ 603 at pp 611–612:

> More pertinently, however, was the fact that these very documents later formed the basis of serious objection by counsel for the defendant in his submission at the close of the case before the second trial judge who then overruled the ruling of the first trial judge on the admissibility of the said exhibits.
>
> Now two issues arise here that we consider relevant. Firstly, can counsel raise a valid objection at the conclusion of a trial to documents properly tendered, and marked at a trial, and not objected to by counsel, when the documents were first tendered as exhibits?
>
> Secondly, and more important than that, can a judge who hears only submissions at the end of a trial overrule the ruling of the trial judge who had heard evidence at the trial, and had properly admitted the exhibits?'
>
> We begin by addressing the second issue, and can do no better than reiterate the principles enunciated in the case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66, 'on the issue of a finality of a ruling made by a judge on issues of procedure such as the admissibility of documents as in the present case. This court has stated in clear and lucid terms as follows:
>
> > 'We cannot over emphasize the proposition that once a judge makes a ruling substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened wily-nilly. One may ask: how is this approach to be reconciled with the decision in Harrison? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.'
>
> On the strength of the above-mentioned dicta, the ruling of the second judge on the admissibility of the said documents that were ruled admissible by the first judge would be in error …
>
> But the matter does not rest here, for the matrix in this case is slightly different in that, the case was continued by the second trial judge, on the

retirement of the first trial judge. As a rule, since the case was not heard de novo, the second trial judge was entitled with the consent of the parties to recall, and examine any witness that he may wish, and the parties are given the liberty to re-submit on any point previously canvassed. See *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222.

By allowing parties to re-submit on any point, we would take it to mean that a different ruling on a previously raised procedural issue could be made by the second trial judge. Was this the case in this instance? We think not, as the second trial judge re-heard merely submissions by counsel at the end of the defence case. *There was no re-submission to speak of on any procedural issues, and hence the second trial judge's ruling on the admissibility of the said documents in his grounds of judgment was flawed.*

In the event, we are held wrong on both courts, we now address our mind to the admissibility on each of the documents held to be inadmissible by the second judge. Forefront to our minds, is that inadmissible evidence does not become admissible simply by reason of failure to object. See *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, and *Mui Bank Bhd Johore v Tee Puat Kuay* [1993] 4 CLJ 69.

A matter of interest before us is that judging from the notes of evidence before us the second trial judge was confronted with conflicting evidence ...

The said trial judge, had to our minds, determined the credibility of these witnesses from the sterile print of the notes recorded by the first trial judge. We find this manner of assessment of witnesses slightly discomfiting. To our minds, when an application is made that a case be continued before another judge, and not heard de novo, the presiding judge should be given full liberty to recall, and re-examine any witness, and to re-submit on any point, although the trial may be continued on the evidence of the transcript of the earlier judge's notes. See Shanmugam v Pitchamany & Anor [1976] 2 MLJ 222.

In vain this was not done in this instance. Hence, the assessment of evidence of the second trial judge must be viewed with caution … (Penekanan ditambah).

[12] Walaupun kedua-dua kes tersebut di atas adalah kes sivil, Mahkamah ini berpendapat prinsip dalam kedua-dua kes itu boleh diguna pakai tentang penerimaan dokumen-dokumen sebagai keterangan dalam kes jenayah dan dalam rayuan di hadapan Mahkamah ini. Oleh kerana dokumen-dokumen berkenaan telah dikekalkan sebagai ID oleh majistret pertama, ia tidak boleh diambil kira sebagai keterangan dari segi undang-undang, malangnya telah diambil kira oleh majistret kedua sebagai keterangan selepas mengenepikan keputusan yang dibuat oleh majistret pertama. Mahkamah ini berpendapat seperti yang dinyatakan terlebih dahulu bahawa majistret kedua telah melakukan satu kesilapan dari segi undang-undang dengan mengambil kira dokumen-dokumen yang tidak boleh diambil kira dan tindakan tersebut tidak dapat dibaiki di bawah s 422 Kanun Acara Jenayah kerana ini telah melibatkan keterangan yang sepatutnya tidak boleh diterima dari segi undang-undang di atas keputusan yang telah dibuat oleh majistret pertama bahawa dokumen-dokumen yang berkenaan dikekalkan sebagai ID.

[13] Sebaliknya, mahupun dokumen-dokumen tersebut sepatutnya dikekalkan sebagai ID, timbalan pendakwa raya yang bijaksana berhujah bahawa keterangan yang sedia ada adalah mencukupi untuk membuktikan satu kes terhadap perayu di atas beban bukti melampaui keraguan yang munasabah tanpa mengambil kira dokumen-dokumen yang ditanda sebagai ID bagi pengecaman. Walau bagaimanapun, mahkamah ini berpendapat dalam keadaan itu dan sekiranya dokumen-dokumen itu tidak diterima pakai sebagai keterangan dan tidak diambil kira ia telah menimbulkan banyak jurang yang material yang tidak diisikan atau dilengkapkan. Oleh itu, mahkamah ini tidak dapat menerima hujahan timbalan pendakwa raya yang bijaksana bahawa tanpa mengambil kira dokumen-dokumen tersebut sebagai keterangan yang boleh diterima pendakwaan masih telah berjaya membuktikan satu kes di atas beban bukti melampaui keraguan yang munasabah terhadap perayu. Mahkamah ini tidak dapat menentukan di peringkat rayuan ini, sama ada keputusan majistret kedua kemungkinan sama di akhir kes pendakwaan di mana pendakwaan telahpun menutup kes di hadapan majistret pertama sekiranya dokumen-dokumen tersebut yang diambil kira oleh majistret kedua tidak sepatutnya diambil kira (discarded) semasa membuat keputusan. Oleh yang demikian, dan dalam keadaan ini, Mahkamah ini berpendapat bahawa faedah yang wujud daripada keraguan ini seharusnya memberi manfaat yang memberi faedah kepada perayu iaitu tanpa mengambil kira dokumen-dokumen tersebut majistret kedua tidak mungkin mendapati pendakwaan telah berjaya membuktikan kes terhadap perayu.

[14] Seterusnya, Mahkamah ini berpendapat bahawa tanpa dokumen-dokumen tersebut diterima sebagai eksibit-eksibit atau sebagai keterangan bagi kes pendakwaan di mana telah ditanda sebagai ID sahaja oleh majistret pertama, perintah majistret kedua untuk memanggil perayu membela diri adalah salah dari segi undang-undang kerana tidak ada keterangan yang mencukupi untuk mencapai satu kes melampaui keraguan yang munasabah terhadap perayu. Dalam kes *Noliana bte Sulaiman v Public Prosecutor* [2000] 4 MLJ 752 di ms 774, Augustine Paul H (pada masa itu) berkata:

> Exhibit P3 therefore remains inadmissible even though there was a failure to object to its admissibility in the sessions court. Its admissibility can be challenged on appeal.
>
> However, no objection was also raised before me on the admissibility of exh P3. That, of course, does not preclude the court from excluding inadmissible evidence on its own motion in the exercise of its ever vigilant duty as the guardian of justice in order to ensure that judicial decisions are made in accordance with law. As I said in *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 170:'
>
> 'If it is the duty of the judge to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence.'
>
> Sharma J said in *Goh Beng Seng v Dol bin Dollah* [1970] 2 MLJ 95 at p 97:
>
> 'The mere fact, however, that counsel for the defendant in this case did not object to the admissibility of the statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the court to disallow all inadmissible evidence even though no

objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.'

I therefore consider it my duty to rule that exh P3 was wrongly admitted in evidence. It must therefore remain inadmissible even though no objection was raised as to its admissibility with the result that the foundation of the prosecution case collapses. Without this vital piece of evidence the order of the learned sessions court judge in calling upon the accused to enter upon her defence is wrong in law.

[15] Dalam kes *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 di ms 183, Abdoolcader H (pada masa itu) berkata:

It is necessary to refer to certain exhibits which have been put in in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973-74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto …

[16] Dalam kes *Ooi Lean Chai v* PP [1991] 2 MLJ 552 di ms 554, Mohamed Azmi HMP berkata:

... Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess.

[17] Dalam kes *Harjit Singh v Regina* [1963] MLJ 287 di ms 288, Winslow H berkata:

... it is clear that inadmissible evidence cannot be rendered admissible, contrary to the rules of evidence, merely because no objection is taken. It is the duty of the prosecution to prove its case strictly and it is well-known that even admissions of facts like these will not suffice in a criminal trial. There was, of course, no such admission.

[18] Dalam kes *R v GK* [2001] NSWCCA 413**,** Pendakwa Raya New South Wales telah mengemukakan dua soalan undang-undang kepada Mahkamah Rayuan Bahagian Jenayah di bawah s 5A(2) Akta Rayuan Jenayah 1912 (NSW). Soalan yang dikemukakan dalam kes itu ada berkaitan dengan rayuan di hadapan mahkamah ini dan adalah:

Where a trial judge makes a discretionary ruling on the admissibility of certain evidence is a trial Judge at a subsequent trial following a failure by the first jury to agree on its verdict bound to follow that ruling with respect to the admissibility of the same evidence?

[19] Sully H (disetujui oleh Mason P dan Dowd H (bersetuju) berkata:

A judge who is asked to exclude evidence under s. 137 of the Evidence Act is not required to exercise any discretion such as is required, for example, under s. 135. The judge is required to make a connected series of findings of law and of fact upon which s 137 will operate without any further discretionary input of the judge.

A particular ruling that some piece of evidence either is, or is not, required by the operation of s 137 to be excluded can be re-visited by the trial judge at any time until the Crown and the accused have finally closed their cases. The evidentiary ruling is then final for as long as the verdict remains on foot, unless the ruling is shown to have been tainted by fraud, or if fresh evidence, the acceptance of which will change the findings fundamental to the earlier ruling, is shown to exist … (Rujuk kes *Rogers v The Queen* [1994] 181 CLR 25 dan *R v Edwards* [1997] 94 A Crim R 204) (Penekanan ditambah.)

[20] Dalam kes *Aw Kew Lim & Ors v Public Prosecutor* [1987] 2 MLJ 601, satu dokumen yang dikeluarkan dari Pendaftaran Syarikat dan Perniagaan telah dikemukakan oleh pendakwaan untuk membuktikan rakan kongsi bagi syarikat Supreme Record Centre. Peguambela bagi tertuduh tidak membantah untuk menerima dokumen sebagai keterangan. Perayu diperintahkan untuk membela diri dan beliau memilih tidak memberi keterangan dan seterusnya disabit. Perayu telah disabit dan dihukum denda di bawah s 3(1) Akta Hak Cipta (Gramophone Records dan Government Broadcasting) 1985. Perayu merayu kepada Mahkamah Tinggi terhadap sabitan dan hukuman. Dalam keputusan untuk membenarkan rayuan dan menepikan sabitan dan hukuman *Chan Sek Keong PK* (pada masa itu) di ms 603 berkata:

… it is clear law that inadmissible evidence does not become admissible because of failure of counsel to object to its admission …

… This was a case where, if Exhibit P20 had not been admitted, the prosecution had not crossed the threshold of proving a prima facie case for the accused to answer.

[21] Dalam kes *Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 5 MLJ 542, perayu telah menutup kes selepas memanggil seorang saksi. Selepas itu responden tidak mengemukakan sebarang keterangan dan berhujah tiada kes untuk jawab. Kemudian perayu mendapat kebenaran daripada majistret untuk memanggil semula SP1 untuk kemukakan keterangan lanjut tentang pengakuan yang dibuat oleh responden di dalam satu surat facsimile di mana telahpun ditanda 'ID(P)'. Responden membantah untuk kemukakan surat tersebut kerana isu penerimaan (admissibility) tuntutan perayu terhadap responden untuk barangan dijual dan serah telah ditolak oleh majistret. Perayu merayu kepada Mahkamah Tinggi. Abdul Kadir Sulaiman H (pada masa itu) berkata:

… introducing the evidence at that stage of the proceedings, ie after the close of the case for the appellant, amounts to introducing new evidence, since the appellant had decided to close its case …

[22] Dalam rayuan di hadapan Mahkamah ini dan mengikut keputusan *R v GK* pendakwaan telahpun menutup kes selepas memanggil 15 orang saksi dan kes ditangguh untuk hujah-hujah dan keputusan diberi oleh majistret pertama. Dalam keadaan itu, keputusan yang dibuat oleh majistret pertama tentang dokumen-dokumen tersebut adalah muktamad dan masih dikekalkan sebagai ID dan majistret kedua tidak boleh menepikan keputusan tersebut dengan menerima masuk dokumen-dokumen yang

ditanda ID kepada eksibit-eksibit dan ditanda P sebagai keterangan pendakwaan tanpa menjemput kedua-dua pihak dan mendengar hujah-hujah lebih lanjut berkaitan dengan dokumen-dokumen tersebut.

[23] Mahkamah ini juga ingin menyatakan bahawa s 73A Akta Keterangan 1950 yang diguna pakai oleh majistret kedua untuk menerima dokumen-dokumen yang ditanda ID sebagai keterangan yang boleh diterima adalah satu kesilapan dari segi undang-undang kerana peruntukan di bawah s 73A tersebut tidak ada kaitan dan tidak boleh dipakai untuk perbicaraan jenayah dan hanya dipakai untuk kes-kes sivil sahaja. Sebenarnya s 73A tersebut dengan jelas menyatakan bahawa peruntukan itu dipakai hanya untuk prosiding sivil sahaja (rujuk kes *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702).

[24] Mahkamah ini berpendapat bahawa tugas majistret kedua yang mengambil alih kes itu pada peringkat di mana pendakwaan telahpun tutup kes bukanlah untuk mengkaji sama ada majistret pertama telah membuat kesilapan apabila tidak menerima dokumen-dokumen tersebut sebagai keterangan bagi pendakwaan tetapi tugas majistret kedua adalah untuk meneliti keterangan-keterangan yang dirakamkan oleh majistret pertama bersama dengan eksibit-eksibit yang telah diterima sebagai keterangan dan membuat keputusan sama ada pendakwaan telah membuktikan satu kes terhadap perayu di atas beban bukti melampaui keraguan yang munasabah. Adalah wajar dinyatakan di sini bahawa bidang kuasa majistret pertama dan majistret kedua adalah sama (co-ordinate) dan seorang Majistret yang mempunyai bidang kuasa yang sama tidak boleh menepikan keputusan yang dibuat oleh seorang majistret yang lain khususnya dalam kes ini sama ada dokumen-dokumen boleh diterima sebagai keterangan atau sebaliknya. Keputusan itu hanya boleh dikaji di peringkat rayuan oleh Mahkamah Tinggi dan sekiranya seorang tertuduh dilepas dan dibebaskan berdasarkan kepada keputusan tersebut dan sekiranya pendakwaan tidak berpuas hati tentang keputusan tersebut, pendakwaan berhak untuk merayu kepada Mahkamah Tinggi terhadap keputusan yang dibuat di akhir kes pendakwaan. Walau bagaimanapun, dalam kes *Satvinder Singh v Public Prosecutor* [1987] 1 MLJ 500 yang dirujuk oleh peguam perayu dengan segala hormatnya tidak ada kaitan dan relevan kepada bidang kuasa majistret pertama dan majistret kedua dalam rayuan ini. Dalam kes itu, keputusan Mahkamah Tinggi adalah tentang kuasa seorang Pendaftar Mahkamah Rendah yang mempunyai kuasa sebagai Majistret Kelas Kedua dan di antara Majistret Kelas Pertama dan harus dibezakan dengan fakta dan keadaan dalam rayuan ini.

[25] Walau bagaimanapun, kes itu telah dirayu kepada Mahkamah Agung lihat Rayuan Jenayah Mahkamah Agung No 24 tahun 1986. Mahkamah Agung telah membenarkan rayuan oleh pendakwaan pada 8 Disember 1986 terhadap keputusan Mahkamah Tinggi. Untuk lengkapkan keputusan Mahkamah ini, kandungan perintah Mahkamah Agung adalah seperti berikut:

IN THE SUPREME COURT OF MALAYSIA AT KUALA LUMPUR
(Appellate Jurisdiction)

SUPREME COURT CRIMINAL APPEAL NO 24 OF 1986

BETWEEN

PUBLIC PROSECUTOR APPELLANT

AND

SATVINDER SINGH S/O JAI SINGH RESPONDENT

(In the matter of Negeri Sembilan
Criminal Application No 54–2–86 in the
High Court of Malaya at Seremban)

Between

Satvinder Singh s/o Jai Singh Applicant

And

Public Prosecutor Respondent

CORAM: THE HONOURABLE TAN SRI DATO' ABDUL HAMID BIN HJ. OMAR, CHIEF JUSTICE MALAYA

THE HONOURABLE TAN SRI DATUK LEE HUN HOE, CHIEF JUSTICE BORNEO

THE HONOURABLE TAN SRI DATUK HASHIM BIN YEOP ABDULLAH SANI SCJ

IN OPEN COURT
THIS 8TH DAY OF DECEMBER, 1986

O R D E R

THIS APPEAL coming on for hearing this day in the presence of Encik Mohtar bin Abdullah, Deputy Public Prosecutor (Encik Jalaldin bin Hussain, Deputy Public Prosecutor with him) for and on behalf of the Appellant and Mr. Christopher Fernando of counsel for the Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING the Deputy Public Prosecutor and counsel as aforesaid IT IS ORDERED that the Appeal be and is hereby allowed AND IT IS ALSO ORDERED that the order of the learned Judge be and is hereby set aside.

GIVEN under my hand and the seal of the Court this 8th day of December, 1986.

Sgd
SENIOR ASSISTANT REGISTRAR,
SUPREME COURT MALAYSIA,
KUALA LUMPUR.

[26] Setelah meneliti kes *Satvinder Singh v Public Prosecutor*, mahkamah ini berpendapat adalah jelas bahawa tidak boleh dinafikan bahawa bidang kuasa majistret pertama dan majistret kedua dalam kes di hadapan Mahkamah ini adalah sama iaitu 'co-ordinate jurisdiction' walaupun tidak ada sebarang alasan-alasan kenapa Mahkamah Agung dalam kes tersebut membenarkan rayuan terhadap keputusan Mahkamah Tinggi.

Majistret Kedua Memakai Beban Bukti Yang Salah Di Akhir Kes Pendakwaan

[27] Seterusnya, isu di mana majistret kedua memakai beban bukti yang salah iaitu, beban prima facie dan bukan beban bukti melampaui keraguan yang munasabah di akhir kes pendakwaan seperti dicatitkan di ms 191 Rekod Rayuan, mahkamah ini berpendapat bahawa mahupun majistret kedua mengguna pakai beban bukti yang salah itu bukan semestinya mengubah atau membatalkan keputusan tersebut sekiranya terdapat keterangan yang mencukupi atau 'overwhelming' untuk membuktikan pertuduhan terhadap perayu sama ada di atas beban prima facie atau melampaui keraguan yang munasabah. Mahkamah ini ingin merujuk kepada keputusan Mahkamah Rayuan baru-baru ini pada 15 Ogos 2003 dalam kes *Public Prosecutor v Ishak Hj Shaari & other appeals* [2003] 3 CLJ 843 di Rayuan Jenayah M-09-18-97, Rayuan Jenayah W-09-15-98, dan Rayuan Jenayah W-09-10-00 yang diputuskan oleh Jemaah lima orang Hakim Mahkamah Rayuan. Dalam kes itu, Mahkamah Rayuan melalui Mohd Noor Ahmad HMR (pada masa itu) berkata:

> And the misdirection on the standard of proof at the end of the trial involves a breach of the basic principle of criminal law, that is to say, the cardinal principle in criminal law is the duty of the prosecution to prove the guilt of the accused beyond all reasonable doubt. In short, the first breach is a breach of an explicit provision of the CPC and the second breach involves a principle of general importance in the administration of justice. Although the respective learned High Court Judges had given the right reasons for the breaches, with due respect, we do not agree with their conclusions that the misdirections were illegalities for which s 422 of the CPC could not be invoked to cure the breaches without proper consideration as to whether or not the misdirection had occasioned a failure of justice. The words 'unless such error, omission or irregularity ... has occasioned a failure of justice' at the end of s 422 qualify the entire section. In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no

prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused. But, none of the learned High Court Judges in these appeals did really consider whether or not the misdirection had occasioned a failure of justice. They simply struck it down as an illegality for the aforesaid reasons. With due respect, we are of the opinion that such approach is not in consonance not only with the modern trend but also not in keeping along with certain well-established and well-understood lines that accord with our notion of natural justice that can be discerned from the Indian experience. We say so because, firstly, on the reasoning of the respective learned High Court Judges that the misdirections were illegalities as they breached an explicit provision of the CPC, the Indian authorities cited above had established that the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated is unreal. Further, the question whether a particular provision is stated in positive or in negative terms is not the true criterion, because a disregard of an express prohibition was regarded as curable. Secondly, we are of the view that, although the then existing s 173(f) of the CPC had expressly provided the standard of proof, there was an ambiguity in the provision with regard to the standard of proof required of the prosecution at the close of its case at the time when the trials were held. However, that ambiguity was finally resolved when *Arulpragasan*'s case was decided. That being the case, guided by the Indian cases, the question we should ask ourselves is whether the trials *had been conducted in substantial compliance with the CPC or in a manner substantially different* from that prescribed. If the trials were conducted in a manner or mode different from that prescribed by the CPC the trials were bad and the question of curing an irregularity did not arise, but if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the *course of such conduct* the irregularity could be cured under s 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC. From the respective record of appeal we are satisfied that the trials of the respondents had been conducted substantially in the manner prescribed by the CPC but the misdirection on the standard of proof only arose in the conduct of the trials. That being the case, again guided by the Indian cases, the misdirection could be cured under s 422. Even if we are to regard that the misdirection on the standard of proof as part of the provisions about the mode of trial which at one time were so vital as to make any departure therefrom an illegality that could not be cured, that was later construed to mean that the situation only applies when there is an express prohibition and there is no prejudice. In these appeals before us, there is no express prohibition as such in the CPC. Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration applies to the misdirection at the end of the case. Therefore, we conclude that the misdirection on the standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned a failure of justice.

[28] Seterusnya, mahkamah ini yang terikat dengan keputusan Mahkamah Rayuan berpendapat bahawa Mahkamah Tinggi ini yang bersidang sebagai bidang kuasa rayuan tidak boleh membenarkan rayuan dan mengenepikan sabitan di atas alasan bahawa beban bukti yang diguna pakai oleh majistret kedua adalah salah tetapi mahkamah ini harus meneliti

keseluruhan keterangan-keterangan untuk memastikan sama ada ianya mencukupi untuk mengekalkan sabitan walaupun beban bukti salah diguna pakai. Pendek kata, sekiranya ada keterangan yang mencukupi atau 'overwhelming' untuk membuktikan kes terhadap seorang tertuduh tetapi di mana mahkamah perbicaraan telah menggunakan beban bukti yang salah dari segi undang-undang, alasan itu sahaja tidak mencukupi untuk menepikan sabitan. (Rujuk kes *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 dan *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 256). Di atas keputusan itu, dan setelah meneliti keterangan-keterangan yang dirakamkan oleh majistret pertama dan tanpa mengambil kira dokumen-dokumen yang dikekalkan sebagai ID**,** mahkamah ini masih mendapati bahawa keterangannya tidak mencukupi untuk membuktikan unsur-unsur atau intipati-intipati pertuduhan di atas beban bukti melampaui keraguan yang munasabah terhadap perayu.

[29] Majistret kedua juga tersilap apabila beliau berkata dalam Alasan-Alasan Penghakiman bahawa terdapat semua 14 orang saksi-saksi pendakwaan yang dipanggil dan beliau menyatakan angka saksi-saksi pendakwaan sebanyak dua kali bahawa terdapat 14 orang saksi pendakwaan di ms 201 Rekod Rayuan walaupun di ms 216 beliau berkata bahawa 15 orang saksi. Akibat perbezaan angka saksi pendakwaan timbul satu keraguan sama ada majistret kedua memberi perhatian dan mengambil kira keterangan hanya 14 orang saksi di mana beliau berkata sebanyak dua kali atau 15 orang saksi. Dalam kes *Teay Wah Cheong v Public Prosecutors* [1964] MLJ 21 di ms 22 terdapat tiga orang saksi yang menyaksikan kemalangan dan keterangan dua orang saksi selesai dirakamkan oleh majistret pertama dalam kes itu. Bagaimanapun, majistret kedua yang mengambil alih kes itu diteruskan dengan sambung bicara mendapati hanya terdapat seorang saksi sahaja yang menyaksikan kemalangan iaitu keterangan seorang saksi yang dirakamkan oleh beliau sendiri. Dalam keputusannya untuk membenarkan rayuan tertuduh dan ketepikan sabitan dan hukuman, di antara alasan-alasan lain Hashim H berkata:

> *In his grounds of judgment the learned president stated there was in fact only one eye-witness to the accident*, presumably the wife of Abdul Salam whose evidence was recorded by the present president. *However, the whole record shows there were two other* eye-witnesses whose evidence was recorded by the former president. (Penekanan ditambah.)

[30] Dalam kes *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 di ms.142, Edgar Joseph Jr HMA yang memberi alasan-alasan keputusan Mahkamah Agong berkata:

> Clearly, therefore, the trial judge, was bound to, but *did not view the whole of the evidence objectively and from all angles*, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy*: '… the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.

We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred. (Penekanan ditambah.)

[31] Di atas keseluruhan keterangan yang boleh diterima (admissible evidence) dan selepas mengambil kira kesilapan oleh majistret kedua seperti yang dinyatakan di atas tentang prosedur dan keterangan, Mahkamah ini berpendapat bahawa ada keraguan yang munasabah di atas pendapat yang menentukan sama ada perayu boleh didapati bersalah atau tidak berdasarkan keterangan yang boleh diterima dalam kes ini. Ada kemungkinan bahawa dan sekiranya majistret kedua dapat meneliti keseluruhan keterangan daripada 15 orang saksi, keputusan majistret kedua akan berlainan di mana membebaskan perayu juga tidak boleh dielakkan (cannot be excluded). Oleh itu, sabitan terhadap perayu tidak dapat dikekalkan dan harus diketepikan.

[32] Mahkamah ini juga mendapati bahawa majistret kedua juga telah silap dari segi undang-undang dan fakta apabila beliau hanya meneliti keterangan daripada 14 orang saksi di keseluruhan kes pendakwaan manakala pendakwaan mengemukakan 15 orang saksi. Dalam keadaan itu, mahkamah ini tidak dapat pasti mana satu keterangan saksi pendakwaan majistret kedua tidak ambil kira, sama ada saksi yang penting atau tidak dan mahkamah ini tidak dapat membuat andaian di atas perkara-perkara yang penting seperti keterangan saksi-saksi pendakwaan dan ini hanya diketahui oleh majistret kedua sendiri. Timbalan pendakwa raya sekali lagi dengan jujur telah mengakui bahawa majistret kedua berkata hanya terdapat 14 orang saksi pendakwaan di mana sebenarnya 15 orang saksi telah memberi keterangan di hadapan majistret pertama. Oleh itu, timbalan pendakwa raya berhujah bahawa pendakwaan tidak dapat memberitahu keterangan saksi yang mana majistret kedua telah tertinggal dan tidak ambil kira pada masa beliau membuat keputusan. Walau bagaimanapun, timbalan pendakwa raya yang bijaksana berhujah bahawa masih ada kes untuk dijawab oleh perayu. Mahkamah ini dengan segala hormatnya tidak dapat menerima hujah-hujah timbalan pendakwa raya yang bijaksana bahawa walaupun majistret kedua hanya meneliti keterangan daripada 14 orang saksi pendakwaan mahupun terdapat 15 orang saksi, pendakwaan masih telah membuktikan kes terhadap perayu. Bagaimanakah mahkamah ini dapat tahu keterangan saksi yang mana ditinggalkan dan tidak diambil kira oleh majistret kedua iaitu sama ada keterangan seorang saksi yang penting atau tidak penting dan mahkamah ini tidak ingin membuat spekulasi tentang perkara seperti ini. Mahkamah ini berpendapat bahawa keadaan dan keterangan seperti yang ditimbulkan dalam rayuan ini harus memberi manfaat kepada perayu. Dalam kes *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 di ms 188, Edgar Joseph Jr. HMA bagi Mahkamah Agong berkata:

… having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in

Watt or Thomas v Thomas) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence. Having done so, we were amply satisfied that 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty'. (Rujuk kes *Teay Wah Cheong v PP* [1964] MLJ 21) (Penekanan ditambah.)

[33] Dalam kes *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514 di ms 534, Mohamed Azmi HMP berkata:

... the court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge.

[34] Dalam kes ini, pegawai pendakwa di mahkamah rendah telah berhujah bahawa sebahagian keterangan adalah mengikut keadaan (circumstantial) dan bukan keterangan terus (direct) tetapi majistret kedua yang membuat keputusan tidak menyatakan sama ada beliau membuat keputusan berdasarkan kepada sebahagian keterangan yang mengikut keadaan (circumstantial) atau sebahagian keterangan yang terus (direct) atau sebaliknya. Pendapat majistret kedua sama ada keterangan yang dikemukakan oleh pendakwaan adalah keterangan terus (direct) atau sebahagiannya adalah keterangan mengikut keadaan (circumstantial) adalah penting kerana beban bukti yang dipakai dari segi undang-undang kepada keterangan mengikut keadaan dan keterangan terus adalah berbeza. Rujuk kes *Kartar Singh & Anor v Rex* [1952] MLJ 85 di ms 86 tentang bukti untuk kedua-dua jenis keterangan di mana Murray-Aynsley H berkata:

… Where there is *direct evidence*, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of *circumstantial evidence* the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all. (Penekanan ditambah.)

(Rujuk kes-kes *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232, *Jayaraman & Ors v PP* [1982] 2 MLJ 273 dan keputusan Mahkamah Persekutuan di ms 306 di ms 310 dan *Juraimi bin Husin v PP* [1998] 1 MLJ 537)

[35] Di atas keseluruhan keterangan, keadaan kes ini dan selepas meneliti dan mengambil kira otoriti-otoriti termasuk keputusan Mahkamah Rayuan yang baru-baru ini dalam kes *PP v Ishak Hj Shaari & other appeals* dan di atas keterangan yang dikemukakan oleh pendakwaan di mana dan tanpa mengambil kira dokumen-dokumen yang ditanda sebagai ID, mahkamah ini berpendapat bahawa tidak ada keterangan yang mencukupi untuk membuktikan pertuduhan terhadap perayu di atas beban bukti melampaui keraguan yang munasabah. Keputusan oleh seorang majistret perbicaraan hanya boleh dibuat di atas keterangan yang boleh diterima (admissible evidence) dan bukan berdasarkan kepada keterangan yang tidak seharusnya diterima oleh mahkamah.

Kedudukan Kes Apabila Kes Di Separuh Bicara Oleh Seorang Majistret Dan Kemudiannya Diambil Alih Oleh Majistret Yang Lain – Seksyen 261 Kanun Acara Jenayah

[36] Isu, sama ada majistret kedua boleh membuat keputusan di atas keterangan-keterangan yang dirakamkan oleh majistret pertama yang melibatkan kredibiliti saksi-saksi terutamanya selepas pendakwaan menutup kes dan hanya tinggalkan untuk keputusan sahaja. Mahkamah ini berpendapat bahawa dalam keadaan itu dan di mana kes pendakwaan telahpun ditutup, adalah lebih wajar majistret pertama seharusnya membuat keputusan, sama ada pendakwaan telah berjaya membuktikan satu kes, sama ada di atas beban keraguan yang munasabah ataupun di atas beban prima facie atau berdasarkan kepada keterangan yang mengikut keadaan dan kedudukan undang-undang pada masa itu. Walau bagaimanapun dan sebaliknya dalam kes ini, majistret kedua yang menggantikan majistret pertama haruslah mengambil inisiatif untuk bertanya kepada kedua-dua pihak sama ada mereka perlu memanggil semula saksi-saksi yang telah memberi keterangan di hadapan majistret pertama khususnya saksi-saksi penting supaya majistret kedua dapat menentukan dokumen-dokumen yang dikekalkan sebagai ID sama ada ianya boleh ditimbang semula di atas keterangan lanjutan yang didengar oleh beliau sendiri dan selepas mendengar hujah-hujah lanjutan tentang dokumen-dokumen tersebut, sama ada sepatutnya ditukarkan sebagai eksibit atau masih dikekalkan sebagai ID.

[37] Dalam kes di hadapan mahkamah ini walaupun peguambela bagi perayu tidak memohon kepada majistret kedua untuk memanggil saksi-saksi yang tertentu atau mendengar kes semula de novo, majistret kedua harus memutuskan dengan fikiran terbuka sama ada beliau memutuskan untuk tidak memanggil saksi-saksi yang telah memberi keterangan sama ada untuk memberi keterangan semula dan seterusnya sama ada beliau berpuas hati dengan keterangan yang sedia ada walaupun pendakwaan telah tutup kes. Majistret kedua harus memberi alasan kenapa beliau tidak menggunakan budi bicara untuk mendengar kes semula (de novo) seperti di peruntukan di bawah s 261 Kanun Acara Jenayah di mana beliau tidak langsung sentuh tentang perkara ini.

[38] Dalam kes *Public Prosecutor v Kulasingam* [1974] 2 MLJ 25, Presiden Mahkamah Sesyen Seremban, Abdul Murad bin Sheikh Ismail yang telah mendengar kes (dipanggil `Presiden Pertama') telah ditukarkan sebagai timbalan pendakwa raya di Negeri Sembilan iaitu negeri yang sama di mana Presiden menjalankan tugas-tugas di Mahkamah Sesyen Seremban sebelumnya. Oleh itu, dan untuk mengelakkan sebarang kemungkinan Presiden Pertama dapat akses ke atas kertas siasatan sebagai timbalan pendakwa raya di Negeri yang sama dan dalam keadaan itu Mahkamah Tinggi Seremban memerintahkan beliau seharusnya tidak mendengar kes itu walaupun beliau telah memerintahkan pembelaan dipanggil pada 20 September 1972 di akhir kes pendakwaan di atas 27 orang saksi pendakwaan dan 98 eksibit yang dikemukakan. Dalam kes itu, Presiden Kedua yang menggantikan Presiden Pertama telah memerintahkan pada

21 September 1973 kes di dengar de novo tetapi tidak dapat diteruskan de novo dan Presiden Ketiga yang menggantikan Presiden Kedua, juga pada 29 Januari 1974 memerintahkan kes di dengar 'de novo'. Bagaimanapun kes itu disebut di hadapan Presiden Pertama pada 29 Januari 1974 di atas perintah de novo. Dalam kes itu, timbalan pendakwa raya mencadangkan kes diteruskan di bawah s 261 Kanun Prosedur Jenayah walaupun peguam tertuduh membantah dan memohon kes di dengar de novo seperti diperintahkan oleh Presiden Kedua dan Ketiga. Seterusnya satu permohonan untuk semakan difailkan di Mahkamah Tinggi Seremban untuk menghalang kes diteruskan di hadapan Presiden Pertama. Hashim Yeop A Sani H (pada masa itu) memerintahkan bahawa (1) kes diteruskan di bawah s 261 Kanun Acara Jenayah di hadapan Presiden yang lain dan perintah memanggil bela diri yang dibuat oleh Presiden Pertama pada 20 September 1972 di atas keterangan-keterangan yang dirakamkan daripada 27 orang saksi oleh Presiden Pertama dikeluarkan dari rekod mahkamah dan seterusnya perintah de novo yang dibuat oleh Presiden Kedua dan Ketiga pada 21 September 1973 dan 29 Januari 1974 masing-masing diketepikan. Dalam keputusan yang diberi Hashim Yeop A Sani H (pada masa itu) berkata:

> The problem involved in this case is not infrequently encountered in the administration of justice in the lower courts of this country. The reason is simple and that is the Judicial and Legal Service of the Federation is divided into two main departments namely, the Judicial Department and the Legal Department. Officers serving in the Judicial Department are appointed and gazetted as Presidents of Sessions Courts and Magistrates and officers serving in the Legal Department are appointed and gazetted as Federal Counsel or Deputy Public Prosecutors. Because all these officers belong to the same parent service they are transferable from one Department to the other more often than not with short notice thereby requiring them to exercise entirely different functions in the administration of the law. *My view has always been that it would be perfectly proper for a President or Magistrate who has since been transferred to the Legal Department to assume functions as Federal Counsel or Deputy Public Prosecutor to complete any part-heard cases originally heard by him in the court where he was previously stationed. But of course this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice as for example in a case where the officer concerned was previously a President or Magistrate in the same State but has now been appointed to be a Deputy Public Prosecutor in the same State*. The mere fact that by virtue of his office he has access to investigation papers relating to the case should disqualify him from hearing the case.
>
> The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.
>
> It is clear in this case that the original President Encik Abdul Murad was subsequently appointed Deputy Public Prosecutor in Negri Sembilan. It is therefore not in the interest of justice that he should continue to hear this case notwithstanding that he had already made an order to call for the defence. Justice must not only be done but also must be seen to be done.

It is noted from the records of this case that two orders of trial de novo were made, one following the other. These orders were made by different Presidents on different dates, namely by Encik Mohd. Noor, the officer who succeeded Encik Abdul Murad, on 21 September 1973, and Encik Wan Abdul Aziz, on 29 January 1974.

Section 261 of the Criminal Procedure Code provides that whenever any magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. The purpose of this section is to prevent a re-hearing in certain cases where a re-hearing will result in unnecessary hardship or injustice or unreasonable expenditure subject always to the guarantee as provided in proviso (a) that the accused may demand any witnesses to be re-summoned or re-heard.

The present case is a case in point having regard to the large number of witnesses already called and given evidence and the large number of exhibits already tendered. The difficulty in this case is only that a finding of guilt had already been made by the original President and he had also proceeded to record the evidence of the first defence witness; but this difficulty is not insurmountable. Section 325 of the Criminal Procedure Code allows the High Court in its discretion to exercise any of the powers conferred by section 316 of the Criminal Procedure Code. The order of the original President on the finding of guilt is in my view an 'order' within the meaning of section 316(c). In the exercise of my revisionary powers I order that the trial of this case be continued under the provision of section 261 of the Criminal Procedure Code on the following terms. To enable that justice may be had the order of calling for the defence made on 20 September, 1972, is set aside; the record of evidence of first defence witness be expunged from the records, and the orders of 'trial de novo' made on 21 September 1973 and 29 January 1974 are set aside'. (Penekanan ditambah.)

[39] Dalam kes *Oh Keng Seng v Public Prosecutor* [1976] 1 MLJ 143, Encik Abdul Khalid bin Abd Manaf, Presiden Mahkamah Sesyen Seremban yang mendengar perbicaraan telah ditukarkan sebagai Timbalan Pendakwa RayaNegeri Kedah di Alor Setar. Pada 5 Mai 1975 apabila kes dipanggil untuk sambung bicara tertuduh membantah untuk Presiden Pertama meneruskan perbicaraan dan memohon kes didengar semula (de novo) oleh pengganti (Presiden Kedua) yang telah ambil alih pada 1 Januari 1975 tetapi bantahan oleh tertuduh ditolak. Bantahan untuk Presiden Pertama meneruskan sambung bicara dibuat di atas alasan bahawa Presiden Pertama telah ditukarkan ke jawatan Timbalan Pendakwa Rayadan beliau telah meletakkan tugasnya sebagai Presiden Mahkamah Sesyen dan ada kemungkinan bias. Bagaimanapun permohonan difailkan di Mahkamah Tinggi oleh tertuduh supaya Presiden Pertama dihalang untuk meneruskan dengan sambung bicara.

[40] Dalam keputusan Ajaib Singh H (pada masa itu) berkata:

I have thought this matter over for a while but I am afraid I find it difficult to agree with the dictum of Hashim Yeop A Sani J. In my opinion Encik Abdul Khalid ceased to exercise any jurisdiction in the trial of the applicant upon his appointment as a deputy public prosecutor no matter where he was transferred to this post. It is

true that his earlier appointment as a president of the Sessions Court has not been de-gazetted but that cannot be the sole criterion in deciding whether or not Encik Abdul Khalid has ceased to exercise jurisdiction in the part-heard case. There are other important factors which must be taken into account. These are that Encik Abdul Khalid is now performing entirely different functions as a deputy public prosecutor and that he has vacated his previous post as president of the Sessions Court in Seremban to another officer who has now assumed jurisdiction over all matters pending in that Court. As a result Encik Abdul Khalid has in my judgment ceased to exercise the powers of a president of the Sessions Court and he is not competent to continue with the hearing of the part-heard case.

I shall now deal with section 261 of the Criminal Procedure Code. All criminal trials in the subordinate courts are summary trials and a decision in a criminal case is made by the magistrate or president who has himself heard all the evidence adduced at the hearing of the case. However, it does occasionally happen that for some reason or other a magistrate or president ceases to exercise jurisdiction in a trial commenced by him and it is precisely to meet such a situation that section 261 of the Criminal Procedure Code has been enacted. The succeeding magistrate or president has a complete discretion in this matter. He may either hear the case de novo or continue from the point where it has been left by his predecessor. If he adopts the latter course the magistrate or president is empowered to act on the evidence which has already been recorded by his predecessor subject to the right of recall of witnesses as provided for in the section. The president who succeeded Encik Abdul Khalid has not taken upon himself to consider section 261 and invoke its provisions presumably thinking perhaps that it was in order for the previous president to complete the trial. In my view it is the duty of the succeeding magistrate or president to take cognizance of all part-heard criminal cases left behind by his predecessor who has ceased to exercise jurisdiction in those cases and to act under the provisions of section 261 by either hearing the cases de novo or to continue from the point where they have been left behind by his predecessor.

The provision in section 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. *It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence*. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved. In the case of Mohamed ldris bin Haji Mohamed Said v. Rex the appellant was convicted by a magistrate on evidence partly recorded by him and partly by his predecessor. The witness whose evidence was acted on by the succeeding magistrate was a crucial witness and there was nothing to prevent this witness from giving evidence if there had been a trial de novo. In ordering a new trial Murray-Aynsley C.J. referring to section 254 of the Straits Settlement Criminal Procedure Code (which is in pari materia with section 261 of our Code) said that the power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that

a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing.

In pointing out what he described as the danger of acting under section 261 of the Criminal Procedure Code Hashim J in the case of *Teay Wah Cheong v Public Prosecutor* said that unless it would cause hardship and great inconvenience to the accused person and witnesses *I think it is much better for a President or a Magistrate to hear the case ab initio rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor vis-a-vis the credibility of the witness.*

The applicant is charged with uttering seditious words. By the very nature of the charge the credibility of witnesses is bound to be of paramount importance and I do not think that this is a proper case where the present president of the Sessions Court may continue from where it was left by his predecessor and act on the evidence already recorded. Furthermore all the 13 prosecution witnesses are readily available to give evidence. The hearing by the previous president lasted only six days and I do not think that a new trial will result in much loss of time and expense.

The applicant's anxiety over the hearing of the criminal trial is understandable. He is facing a serious charge of sedition which in the case of a first offence is punishable with a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment. The applicant is a member of Parliament and if he is found guilty and convicted he stands to be disqualified from being a member of Parliament for five years if upon conviction he is sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars. As I have stated earlier it is my considered opinion that upon the transfer of Encik Abdul Khalid from Seremban on his appointment as a Deputy Public Prosecutor in Kedah he relinquished his powers as a president of the Sessions Court and thereby ceased to exercise any jurisdiction in the trial of the applicant. Even if Encik Abdul Khalid can still be considered as having the powers of a president of the Sessions Court it is I think highly undesirable that he should hear the criminal case any further. It might perhaps have been a different matter if he had remained in the Judicial Department and had been appointed to some other post such as a Senior Assistant Registrar of the High Court but on being appointed a Deputy Public Prosecutor in the Legal Department Encik Abdul Khalid crossed the floor as it were and he can no longer be in a position where he can command the respect of the public as an impartial arbiter if he continues to hear the criminal case. Justice must not only be done but must also be manifestly seen to be done. This is a cardinal principle in the administration of justice and it must override all other considerations. *The judiciary in our country is independent of the executive and the honesty and integrity of the officers who preside over the courts are of a high order.* Let us not on any occasion therefore dispense justice in a manner which may undermine public confidence in the judiciary.

In the exercise of my revisionary powers I order that the trial of the applicant be heard de novo by the present president of the Sessions Court. (Penekanan ditambah.)

[41] Oleh itu, Ajaib Singh H (pada masa itu) tidak mengikut pendapat Mahkamah Tinggi di kes *PP v Kulasingam*.

[42] Dalam kes *PP v Goh Chooi Guan* [1978] 2 MLJ 169, Encik Saari Noor Presiden Mahkamah Sesyen yang mendengar kes penyemakan di

Mahkamah Sesyen Sungai Petani telah ditukarkan sebagai Peguam Kanan Persekutuan di Jabatan Kastam dan Eksais di Kuala Lumpur. Bagaimanapun beliau kembali untuk meneruskan kes di mana pembelaan telah dipanggil terhadap tertuduh keenam. Peguambela tertuduh telahpun membantah Encik Saari Noor untuk meneruskan kes kerana beliau pada masa itu telah ditukarkan ke jawatan Timbalan *Pendakwa Raya*dan permohonan kes harus didengar de novo oleh Presiden Mahkamah Sesyen yang lain. Oleh kerana ada dua keputusan Mahkamah Tinggi yang berlainan, Syed Agil Barakbah H (pada masa itu*)* selepas mengkaji dua kes tersebut, fakta-fakta dan latar belakang kedua-dua kes berkata:

> I have the advantage of reading the two decisions. The facts of the present case, I think, are more or less similar to the latter case. *The sole question is whether upon the transfer of the President, Sessions Court, Sg Patani to the Royal Customs & Excise Department, Kuala Lumpur as Senior Federal Counsel, he has ceased to exercise any jurisdiction in the trial part-heard by him.*
>
> The relevant provision is section 261 of the Criminal Procedure Code, which states:
>
> 261 Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry of a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial.
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not set aside any conviction had or commitment made on evidence not wholly recorded by the Magistrate before whom the conviction was had or the commitment if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.
>
> The clause 'ceases to exercise jurisdiction therein' requires a proper construction having regard to surrounding circumstances. A Magistrate ceases to exercise jurisdiction in a criminal case by his untimely death, retirement or resignation. In all these cases, he will not be able to continue hearing any case part-heard by him. The succeeding Magistrate will therefore have to act according to the requirement of the section. However, in the case of a transfer to another State in the same or similar post, I do not think the section applies. Although section 9 of the Criminal Procedure Code and section 59(2) of the Subordinate Courts Act 92 provide local limits of jurisdiction of Sessions Courts, a President who is gazetted as such for the whole of West Malaysia, is empowered continue the hearing of a case part-heard by him prior to his transfer. In the case of a Magistrate, the proviso of sub-section (2) of section 76 of the same Act accords him with jurisdiction to continue with such trial by virtue of his appointment duly gazetted in the former State. This is in accord with the principle that having seen and heard the witnesses they are the best persons to continue and complete the case in the interest of justice and with a view to ensuring a speedy trial.
>
> *In the case of a transfer to the post of Senior Federal Counsel or Deputy Public*

Prosecutor, I do not consider the President or Magistrate ceases to have jurisdiction, being still gazetted as such. He only ceases to officiate as a President or Magistrate. There appears to be no legal objection under any written law for him to continue the part-heard case. Nevertheless, a different question as regards public interest has to be considered in relation to the overriding principle that justice must not only be done but must manifestly and undoubtedly be seen to be done. A man is disqualified from sitting in a judicial capacity on ground of bias in favour of one side or the other, or of prejudice against one side or of contravention of the rules of natural justice. There need not be actual bias or prejudice, but it is sufficient if in the eyes of right-minded persons there is such likelihood, in the circumstances, even though he is impartial as can be. It is not the mind of the President or the Magistrate that has to be looked into and whether he favours one side at the expense of the other, but rather the impression which would be given to the public at large (per Lord Denning MR in *Metropolitan Properties Co Ltd v Lannon*). In the case of a Deputy Public Prosecutor, whose duties are opposed to those of a President or a Magistrate and who has direct access to investigation papers of criminal cases, it is undesirable in the circumstances for him to sit on the Bench and continue the trial part-heard by him. The succeeding President or Magistrate will have to exercise his powers by invoking section 261.

The position of Senior Federal Counsel is, to my mind, slightly different, especially those who are attached to Federal Ministries and Departments. Their main duty is to give legal advice. Similarly, in the case of Encik Shaari. He is Legal Adviser to the Royal Customs & Excise and if there is any court work he has to perform occasionally, that will be confined to arguing criminal appeals in the High Courts in Customs and Excise cases. His position is unlike that of a Deputy Public Prosecutor in the States. There should therefore be no likelihood of offending the principles if he continues the part-heard case. Nevertheless, that ought to be rarely exercised and only in exceptional cases as the present case.

When I say the present case falls within the exceptional cases, I refer to the facts and surrounding circumstances and the probable effect caused by them. Firstly, the 6th accused was arrested on 24 September 1975 and was first produced in court on 25 September 1975. The first charge preferred against him under s 8 of the Firearms (Increased Penalties) Act 1971, carries a maximum penalty of imprisonment which may extend to 14 years and with whipping with not less than six strokes. The second charge under s 9(a) of the Arms Act carries a penalty of imprisonment for a term not exceeding seven years or to a fine not exceeding $10,000 or to both such imprisonment and fine. The charges, especially the first, are serious. Secondly, the accused has been remanded in custody ever since arrest and though allowed bail at one stage on 30 December 1975, was again remanded in custody when the bailors were discharged on 22 February 1976 until now. He has been produced weekly in court on countless occasions until the case was part-heard by Encik Shaari and also thereafter. From the date of arrest until now the accused has been in custody for nearly two and a half years! I just cannot imagine any good reason for such a state of affairs to be allowed to happen without the case being heard and disposed of earlier.

Next comes the trial proper by Encik Shaari. He commenced hearing on 21 February 1976, heard two prosecution witnesses and continued hearing on May 16, 1976 when the prosecution closed their case after calling nine witnesses. In the course of the trial up to the prosecution stage Encik Shaari admitted a statement made by the sixth accused to the Police after holding a trial within a trial, made an order of acquittal and discharge on six of the accused persons and called upon the 6th accused to enter upon his defence on both charges. The circumstances are such

that if the trial is ordered to be heard de novo or be commenced by the succeeding President from the stage heard by Encik Shaari, it will affect: (i) the six accused persons who are already acquitted and discharged, (ii) the trial within a trial in which the statement by the 6th accused has been admitted because apparently the prosecution witnesses concerned will have to be re called for their evidence to be recorded, and (iii) also the order for calling the defence of the 6th accused made by Encik Shaari, not to mention the very long lapse of time as stated above, in which case the witnesses might have forgotten most of the evidence Moreover, Mr Karpal Singh has applied for the six co-accused to be subpoenaed as defence witnesses, and made no objection at that time for Encik Shaari to continue with the hearing of the case, until the second occasion when Encik Shaari had come from Kuala Lumpur for the same purpose.

I therefore take the view for the reasons stated above, Encik Shaari should continue to hear the case which he has past-heard. I also make an order, which is necessary here, that there must not be any more adjournments and that Encik Shaari should complete hearing the case as soon as practicable from the date that he has fixed for continuation. (Penekanan ditambah.)

[43] Pada akhirnya Encik Saari Noor diperintahkan untuk teruskan kes walaupun beliau ditukar sebagai Timbalan Pendakwa Raya.

[44] Dalam kes *Hj Ibrahim bin Wahab & satu yang lain v Peguam Negara & lain-lain* [1995] 1 MLJ 493 kedua-dua pemohon telah dituduh melakukan kesalahan di bawah s 4(c) Akta Pencegah Rasuah 1961. Di Mahkamah Tinggi, kedua-dua pemohon melalui Notis Usul minta supaya Mahkamah Tinggi perintah Hakim Mahkamah Sesyen mengundur diri (disqualify himself) dari terus mendengar sambung perbicaraan dan meminta Hakim Mahkamah Sesyen yang lain untuk mendengar kes de novo. Dalam kes ini, pembelaan telahpun menutup kes dan Hakim Mahkamah Sesyen tersebut telah meminda tuduhan kepada s 420 Kanun Keseksaan iaitu menipu. Lepas itu, hakim yang berkenaan telah dilantik sebagai timbalan pendakwa raya. Apabila hakim berkenaan telah dipohon untuk menarik diri dari mendengar kes, beliau tidak bersetuju berbuat demikian. Di atas keputusan itu kedua-dua tertuduh membuat permohonan kepada Mahkamah Tinggi. Di antara alasan-alasan yang lain Syed Ahmad Idid H berkata:

Terlebih dahulu, saya ingin mengatakan bahawa saya faham adakalanya perkhidmatan kehakiman dan perundangan memerlukan pertukaran pegawai dengan serta-merta, tetapi bagaimanapun, saya mestilah memutuskan di antara perkhidmatan dan undang-undang, undang-undang mestilah diutamakan dan mengatasi lain-lain kepentingan. Betapa baiknya jika hakim tersebut dikekalkan sehingga perbicaraan itu berakhir dengan adanya satu keputusan tetapi apa boleh buat bagai buah keras di dalam sekul, *Maleb bin Su v PP*, *Cheak Yoke Thong v PP* [1984] 1 MLJ 311. Lihat juga *Magistrates' Court Handbook* (1994 MLJ) di ms 4 dan 5.

The applicant is fearful that if Mr Stanley Augustin acts in two roles of deputy public prosecutor and sessions court judge, `saya mungkin tidak akan dapat suatu perbicaraan yang adil dan saksama'. Cuma atas alasan ini tidak ada bukti langsung dan saya mengetepikannya. Saya juga ambil kira keputusan-keputusan dalam *PP v Kulasingam* [1974] 2 MLJ 26; *Oh Keng Seng v PP* [1976] 1 MLJ 143; *PP v Goh Chooi Guan* [1978] 2 MLJ 169 dan *Empress of India v Anand Sarup* (1881) 3 ILR 563 Allahabad Series.

Tetapi oleh kerana keadaan 'substitution of a charge to one of a more serious nature' telah berlaku, bertambah pula pemohon-pemohon dituduh melakukan jenayah yang lebih berat maka saksi-saksi akan dipanggil semula (s 162 KAJ) maka itu tentu akan memakan masa dan tambah belanja, tidak kira selanjutnya kemungkinan kekeliruan akan berlaku, maka saya berpendapat lebih baik jika seorang hakim mahkamah sesyen lain mendengar kes No 61–11–92 de novo dan dengan itu kedua-dua usul dibenarkan (both applications are granted). Berikutan itu, kedua-dua orang pemohon akan terus menghadap pertuduhan yang sesuai yang diputuskan oleh Pendakwa Rayadan perbicaraan tersebut elok dimulai dan diselesaikan dalam tiga sehingga lima bulan dari sekarang.

[45] Dalam kes *Mohd Amin bin Abdullah lwn Pendakwa Raya* [1995] 1 MLJ 612**,** fakta-fakta mengikut alasan-alasan penghakiman adalah seperti berikut:

FAKTA-FAKTA

Dari keterangan yang diberi adalah jelas bahawa Puan Fadzillah Begum bte Abdul Ghani mendengar lanjutan kes E82-1-92 dan E82-2-92 yang dimaksudkan selepas seorang majistret lain telah ditukar keluar. Perbicaraan di hadapan majistret pertama itu telah bermula sejak 13 April 1992 dan 34 orang saksi pendakwa telah memberi keterangan dan 77 ekshibit dikemukakan oleh kedua-dua pihak pendakwa dan pembelaan sehingga 1 Disember 1992. Di antara saksi yang telah memberi keterangan setakat itu adalah SP4, Dr. Chow Shui Tse, dari Institut Sains dan Perubatan Forensik Singapura (keterangan pakar berkenaan ujian asid dioksiribonuklei (deoxyribonucleic acid) dan Prof Dr Masatsugu Hastismoto dari Kolej Pergigian Tokyo Jepun (keterangan pakar berkenaan pita-pita video).

Apabila Puan Fadzillah Begum mengambil alih kes ini di bawah peruntukan s 261 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), pemohon juga telah memohon (11 Januari 1993) kepada puan majistret Fadzillah Begum untuk satu perbicaraan de novo. Tertuduh pertama dan pihak pendakwa membantah dan, dengan itu, Puan Fadzillah Begum buat keputusan pada 12 Januari 1993 untuk menolak permohonan dan meneruskan perbicaraan.

Berikutan itu, perbicaraan di hadapan Puan Fadzillah Begum telah diteruskan sehingga 17 Mei 1993 apabila pendakwaan menutup kes. Pada masa itu, pendakwaan telah memanggil 72 orang saksi yang memberi keterangan dan sebanyak 90 ekshibit telah dikemukakan (oleh pendakwa dan pembela). Dalam perbicaraan itu, ekshibit-ekshibit video P6, P10, P11, P12 dan P13 telah ditunjuk dan ditonton oleh pihak-pihak yang berkenaan dan mahkamah juga telah mendengar ekshibit P22, sebuah pita kaset.

Kesemua itu diikuti oleh penghujahan panjang lebar oleh semua pihak di hadapan puan majistret dan, pada 16 Jun 1993, puan majistret membuat keputusan bahawa pihak pendakwa telah membuktikan kes prima facie terhadap kedua-dua tertuduh pertama (Mary Anne) dan tertuduh kedua (Kanaperan a/l Ramadass atau pemohon hari ini) untuk kesemua 14 pertuduhan di bawah s 500 Kanun Keseksaan (NMB Bab 45).

Puan Fadzillah Begum juga mendapati keterangan pihak pendakwa berjaya membukti laporan-laporan polis yang palsu telah dibuat oleh tertuduh pertama dan pemohon bagi mencapai niat bersama mereka. Dengan demikian, majistret Puan Fadzillah Begum telah meminda dua pertuduhan yang asal terhadap tertuduh pertama dan pemohon setiap seorang kepada dua pertuduhan di bawah

s 182 Kanun Keseksaan dibaca bersama dengan s 34 Kanun Keseksaan. Dan apabila kes disambung semula pada 1 Julai 1993, peguambela, Encik Vaithylingam, bagi pihak pemohon, telah tarik diri dari mahkamah dan Encik Karpal Singh mulai mewakilinya pada 5 Julai 1993.

Pada 1 Ogos 1993, puan majistret Fadzillah Begum ditukarkan ke Bahagian Guaman, Jabatan Peguam Negara. YAA Hakim Besar Malaya tiada halangan untuk 'Cik Fadzillah Begum menyambung bicara kes yang berkenaan'. Pada 3 Disember 1993, pemohon minta supaya Puan Fadzillah Begum tidak meneruskan sambung bicara kerana jawatannya yang baru itu, atas alasan yang sama, minta supaya kesnya dibicara de novo. Satu lagi wabak penghujahan panjang lebar telah dibuat dan Puan Fadzillah Begum menolak permohonan itu pada 4 Disember 1993. Pada 7 Disember 1993, atas permohonan pemohon, hakim mahkamah tinggi (Abdul Aziz J) selepas mendengar bantahan awal (`preliminary objection') telah ambil keputusan tidak menyemak keputusan puan majistret. Kes telah sambung semula dan kedua-dua tertuduh pertama dan kedua memilih untuk memberi keterangan bersumpah dan tertuduh pertama memanggil 14 orang saksi dan tertuduh kedua (iaini pemohon di sini) telah memanggil 10 orang saksi dan masih belum menutup kes pembelaannya.

Dalam perbicaraan di mahkamah majistret, pemohon telah memohon untuk mencabar kebolehpercayaan tertuduh pertama dan saksi SB3, manakala timbalan Pendakwa Rayatelah memohon untuk mencabar kebolehpercayaan pemohon, saksi SB13, SB17 dan SB19.

Pada 1 Julai 1994, Puan Fadzillah Begum telah ditukarkan menjadi timbalan pendakwa raya, unit pendakwaan di negeri Sarawak. Dan pada 12 Ogos, 1994, pemohon memohon supaya Puan Fadzillah Begum tidak meneruskan sambung bicara kesnya dan sebaliknya kes di mahkamah majistret ini dibicara de novo. Sekali lagi dengan bantahan dari tertuduh pertama dan pihak pendakwa dan selepas mendengar penghujahan yang panjang lebar dari semua pihak, Puan Fadzillah Begum menolak permohonan itu pada 13 Ogos 1994.

KEPUTUSAN

Selepas membincang dan menimba buah fikiran yang pantas dari fakta-fakta dalam kes-kes tersebut, perkara-perkara yang diutarakan oleh timbalan Pendakwa Rayadan kaunsel pemohon, isu-isu, pendapat tambahan mengenai 'public interest' dan prinsip-prinsip undang-undang, maka saya terlebih dahulu menyebelahi kepada kehendak untuk menyelamat perbicaraan (I am inclined towards saving the trial of the cases). Saya berpendapat ianya prioriti utama dan berkehendak kerjasama semua pihak atas harapan maka tujuan yang sama juga menjadi tujuan pemohon. Saya sedang ingat kepada keadaan tertuduh pertama. Sila lihat perenggan III(a) dan (c) di atas. Sila lihat permohonan yang sebut `perintah yang difikirkan wajar dan berpatutan oleh mahkamah'. Saya percaya dengan nasihat yang begitu matang dari peguamnya maka tujuan ini akan tercapai dengan hati terbuka.

Maka dengan saya:

(a) mencadangkan supaya Puan Fadzillah Begum ditukar balik dengan segera ke Jabatan Kehakiman sebagai majistret untuk meneruskan perbicaraan kes-kes yang dimaksudkan dalam permohonan ini dan, dengan spontan, beliau akan membuat segala persiapan berekoran yang sesuai supaya kes-kes diselesaikan dengan teratur, adil dan saksama dalam jangka masa secepat mungkin iaitu tidak lebih dari tiga bulan. Sila lihat perenggan III(d) di atas.

(b) Jika pertukaran balik itu tidak boleh atau tidak dapat diselenggarakan atas apa jua sebab dalam masa dua minggu, iaitu jika Puan Fadzillah Begum tidak kembali bertugas sebagai majistret sebelum 30 November 1994, maka pada 1 Disember 1994, dengan sendirinya mahkamah ini mengesahkan permohonan usul ini diluluskan. Seterusnya perbicaraan kes-kes tersebut di Mahkamah Majistret, Kuala Lumpur akan dimulai de novo dijalankan oleh seorang majistret yang ambil alih mahkamah itu (the succeeding magistrate will commence the trial ab initio). Saya tidak dapat perintah seperti apa terdapat dalam *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 atau *Khageswar Satapathy v Govinda Chandra Navak & Ors* (1973) Cr LJ 739 (sila lihat perenggan IV isu pertama (iv) di atas) dan dari kes-kes sampingan oleh kerana terlalu ramai saksi telah memberi keterangan dan Puan Fadzillah Begum telah dengan sendirinya menonton video dan dengar bukti-bukti yang lain dari mana seorang majistret baru tidak akan tahu atau faham atau `berasa' apa telah berlalu (`the succeeding magistrate cannot assess the value of the evidence recorded, heard or seen by his predecessor'). Lihat *Mohamed Idris bin Hj Mohamed Said v R* [1949] MLJ 31 di mana Murray-Aynsley CJ merujuk kepada s 254 Kanun Acara Jenayah Negeri-Negeri Selat yang `pari materia' dengan s 261 KAJ sekarang. Lihat juga *Teay Wah Cheong v PP* [1964] MLJ 21 oleh Hashim H. Sebaliknya, jika Puan Fadzillah Begum dapat menjadi majistret semula pada atau sebelum daripada 30 November 1994, beliau akan teruskan perbicaraan kes-kes tersebut dan dengan sendirinya permohonan usul ditolak.'

[46] Setelah meneliti keputusan kes-kes berkenaan di atas, Mahkamah ini berpendapat bahawa majistret pertama dalam rayuan di hadapan Mahkamah ini sepatutnya meneruskan dengan sambung bicara. Dalam kes di hadapan mahkamah ini majistret pertama yang telah mendengar kesemua 15 orang saksi pendakwaan, menerima sebahagian eksibit sebagai keterangan yang boleh diterima dan memutuskan untuk mengekalkan 21 dokumen sebagai ID hanya untuk pengecaman harus meneruskan memberi keputusan selepas pendakwaan menutup kes di hadapan beliau. Seterusnya prosedur yang tinggal adalah hanya untuk mendengar hujah-hujah di akhir kes pendakwaan berdasarkan kepada keterangan yang telah diterima dan tentang dokumen-dokumen di mana beliau memerintahkan untuk dikekalkan sebagai ID.

[47] Dalam kes di hadapan mahkamah ini, peguambela bagi perayu memberitahu kepada mahkamah ini bahawa walaupun dua permohonan dibuat kepada ketua pendaftar, supaya membenarkan majistret pertama untuk meneruskan dengan sambung bicara dan supaya beliau dapat membuat keputusan di akhir kes pendakwaan permohonan itu ditolak oleh Pejabat Ketua Pendaftar. Mahkamah ini dengan segala hormatnya berpendapat bahawa sepatutnya Pejabat Ketua Pendaftar harus mendapat satu senarai kes-kes separuh bicara untuk mengetahui kedudukan kes-kes sambung bicara dan setakat mana dan seterusnya peringkat manakah kes itu diselesaikan sebelum satu keputusan dibuat untuk menukarkan majistret atau Hakim Mahkamah Sesyen supaya pegawai berkenaan boleh selesaikan kes-kes separuh bicara seperti dalam keadaan dan latar belakang kes dalam rayuan ini di mana 15 orang saksi telah memberi keterangan di hadapan majistret pertama dan 21 eksibit dikekalkan sebagai ID dan hanya tunggu

untuk membuat keputusan di akhir kes pendakwaan selepas mendengar hujah-hujah oleh kedua-dua pihak. Bagaimanapun dalam kes ini perkara-perkara seperti yang dinyatakan tidak berlaku sekiranya majistret pertama dibenarkan kembali untuk meneruskan dengan sambung bicara sehingga memberi keputusan.

[48] Dalam kes *Kiew Foo Mui & Ors v PP* [1995] 3 MLJ 505 di ms 511, Edgar Jospeh Jr HMP berkata:

> In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset — namely a fair trial, *notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial — whether criminal or civil — is to ensure that justice is done, no doubt, according to law.* (Penekanan ditambah.)

(Rujuk kes-kes *Chong Kwee Hian v PP* [1948] 14 MLJ 191, (2) *Mohamed Idris bin Hj Mohamed Said v Rex* [1949] MLJ 31, *Teay Wah Cheong v PP* [1964] MLJ 21 yang telah dibincang dalam kes *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya* [1996] 3 MLJ 298, *Oh Keng Seng v PP* [1976] 1 MLJ 143 dan *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya* [1996] 3 MLJ 298 di ms 308).

[49] Dalam kes *Chelliah v PP* [1941] MLJ 17 (FMSR), Horne H berkata:

> … The proviso to section 261 of the Criminal Procedure Code which governs a change of Magistrate during a hearing is in these terms:
>
> (a) In any trial the accused may, when the second Magistrate commences his proceedings, *demand* that the witnesses or any of them be re-summoned and re-heard;
>
> In my opinion, such a word as 'demand' makes it obligatory for the Magistrate to recall such witnesses if the accused asks for them and leaves no discretion to the Magistrate to act upon evidence partly recorded by his predecessor and partly by himself.
>
> The conviction is quashed and the fine paid is to be returned.

[50] Dalam kes *Chong Kwee Hian v PP* [1948] MLJ 191, Laville H berkata:

> … Section 261, however, gives the Court in my opinion complete discretion in the matter and it is always very highly desirable that judgment should be given in any case by a Magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses ... (Penekanan ditambah.)

[51] Dalam kes *Teay Wah Cheong v PP* [1964] MLJ 21, Hashim H berkata:

> … Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case ab initio rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor vis-à-vis the credibility of the witness. (Penekanan ditambah.)

[52] Dalam kes *PP v Ishak Hj Shaari & other appeals* [2003] 3 CLJ 843, rayuan oleh pendakwa di Rayuan Jenayah No W–09–15 of 1998 ditolak di mana di ms 862, Mohd Noor Ahmad HMR (pada masa itu) berkata:

> ... In respect of Criminal Appeal No W–09–15 of 1998, we agree with the retrial order because *the assessment on the credibility of witnesses by the learned Magistrate had been jeopardised.* The learned Magistrate took over and continued with the trial from another Magistrate after the prosecution closed its case and thereafter the counsel for each of the accused attacked, inter alia, the credibility of the prosecution witnesses at length. Therefore, we decline to apply the proviso to s 60(1) of the Act to this appeal ... (Penekanan ditambah.)

[53] Dalam kes *Empress of India v Anand Sarup & Ors* 1881 VOL III ILR 564, Encik HP Mulock, seorang Majistret kelas pertama telah menjalankan satu siasatan dan mendengar satu kes pada 21 Julai 1880 di Daerah Meerut terhadap responden dan orang lain tentang satu kesalahan. Kes ini diteruskan selama tiga hari dan keterangan telah dirakamkan. Pada 23 Julai 1880, Encik Mulock telah digazetkan melalui Nota Kerajaan bertarikh 10 Julai 1880 sebagai Majistret dan Pemungut di Daerah Gorakhpur dan pada 23 Julai 1880 beliau telah menyerahkan Daerah Meerut kepada Encik Fisher. Selepas menyerahkan tugas Majistret bagi Daerah Meerut kepada Encik Fisher, Encik Mulock di atas arahan lisan daripada Encik Fisher telah meneruskan kes-kes termasuk kes responden yang di mana sebelum itu telah didengar oleh beliau sehingga kes selesai dan keterangan dirakamkan dan hanya tinggal untuk memberi keputusan. Di sebelah petang pada 23 Julai 1880, Encik Mulock telah menjatuhkan hukuman penjara terhadap responden dan orang lain. Responden dan tertuduh yang lain merayu kepada Hakim Mahkamah Sesyen di Meerut. Hakim Mahkamah Sesyen menepikan sabitan di atas alasan bahawa Encik Mulock yang telah menyerah jagaan Daerah Meerut kepada Encik Fisher tidak mempunyai bidang kuasa di daerah tersebut. Kerajaan tempatan yang tidak puas hati di atas keputusan Hakim Mahkamah Sesyen di atas rayuan telah membawa perkara ini kepada Mahkamah Tinggi untuk menyemak perintah tersebut dan membuat perintah yang sesuai. Kerajaan tempatan berpendapat bahawa mahupun Encik Mulock digazetkan sebagai Majistret di Gorakhpur, beliau masih mempunyai kuasa sebagai Majistret Pertama di daerah Meerut di mana beliau sedang bekerja pada masa itu. Mahkamah Tinggi yang memanggil kes itu untuk semakan dan bersidang dengan panel yang penuh yang didengar oleh lima orang Hakim yang dipengerusikan oleh Ketua Hakim.

[54] Dalam keputusan minority yang tidak disetujui (dissenting) Spankie H berkata:

> ... It is quite according to the spirit of the Act that each Magistrate should pass sentence on proceedings recorded by himself, as appears from the proviso to s 328 of the Code.

Rujuk kes *Bhaskar @ Prabaskar & Ors v State represented by Inspector of Police, Vellore Taluk Police Station* [2000] 2 LRI 803. Juga rujuk kes *Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 5 MLJ

542 di ms 547, *Harjit Singh v Regina* [1963] MLJ 287 dan *Packiam & Anor v PP* [1972] 1 MLJ 247.

[55] Mahkamah ini ingin menyatakan bahawa sebarang keputusan terhadap perayu seperti dalam kes ini harus dibuat berdasarkan kepada keterangan yang boleh diterima (admissible evidence) dan bukan berdasarkan kepada keterangan yang tidak boleh diterima (inadmissible) dari segi undang-undang (rules of evidence). Dalam kes *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 di ms.118, HT Ong bagi Mahkamah Persekutuan berkata:

> ... Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic.

[56] Dalam kes *PP v Mohd Jon* [1993] 1 MLJ 133, tertuduh dituduh di bawah s 39(B)(1)(a) Akta Dadah Berbahaya 1952. Di akhir kes pendakwaan Tan Chiaw Thong H telah memutuskan bahawa tertuduh tiada kes untuk jawab dan melepas dan membebaskan tertuduh pada 2 Mac 1990. Pendakwaan telah merayu kepada Mahkamah Agong di atas keputusan tersebut. Pada 10 Disember 1990 Mahkamah Agong memerintahkan untuk pembelaan dipanggil. Dalam pada masa itu Tan Chiaw Thong H telah bersara. Kes dipanggil di hadapan Richard Malanjum PK (pada masa itu). Timbalan pendakwa raya berhujah bahawa kes itu diteruskan di peringkat pembelaan seperti diperintahkan oleh Mahkamah Agung. Peguambela bagi tertuduh membantah kes diteruskan dari peringkat pembelaan kerana perintah Mahkamah Agong tidak berapa jelas dan tidak ada perintah dimeteraikan yang dikeluarkan dan hakim kedua akan menghadapi kesulitan (disadvantage) kerana tidak dapat menafsir (assess) demeanour 10 orang saksi-saksi yang telah dipanggil apabila pendakwaan menutup kes dan ini tidak termasuk saksi-saksi yang dipanggil di dalam perbicaraan untuk percakapan amaran. Richard Malanjum PK (pada masa itu) yang memerintahkan kes didengar semula (de novo) untuk demi keadilan berkata:

> In the event that all or some of the material witnesses are recalled, would such exercise avoid the delay and the expenses and at the same time avoid any failure of justice?
>
> The learned deputy is mainly concerned with the delay and the expenses if a fresh trial is ordered. I have perused the notes of the evidence and in my view, there are at least six material witnesses (that is the first six witnesses) whose veracity should be given material consideration before coming to any conclusion on the issues of fact in the instant case. Further, in recalling these witnesses, I do not think that the exercise should be merely to observe their appearances or to question them if they were telling the truth when they gave their previous evidence. The exercise should be more than that. It should be done so as to enable the succeeding court to observe their demeanour in the usual course of giving evidence. As such, in my view, the avoidance of delay and expenses would be outweighed by the risk of prejudice or failure of justice that might occasion to the accused in the instant case.

Further, I find that in the several reported cases which dealt with s 261 of the Code, the primary consideration was to ensure that the evidence recorded should be properly evaluated including the credibility of the witnesses who had testified. I find no reason to disregard the common principle enunciated in those cases in considering the present case. Dalam kes *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya* [1996] 3 MLJ 298, tiga belas orang saksi telah memberi keterangan di hadapan Hakim Mahkamah Sesyen Pertama. Pada 1 Oktober 1995 sebelum kes diselesaikan Hakim Mahkamah Sesyen Pertama telah ditukarkan sebagai Penasihat Undang-Undang Negeri Kedah. Hakim Mahkamah Sesyen yang menggantikan, iaitu Hakim Mahkamah Sesyen Kedua pada 25 Mac 1996 telah memutuskan untuk meneruskan kes di bawah s 261 Kanun Prosedur Jenayah dari peringkat di mana Hakim Mahkamah Sesyen Pertama berhenti perbicaraan. Hakim Mahkamah Sesyen Kedua menolak permohonan daripada kedua-dua peguambela yang mewakili kedua-dua tertuduh untuk mendengar kes semula (de novo). Dalam kes itu, Hakim Mahkamah Sesyen Pertama telah memutuskan bahawa percakapan amaran tertuduh pertama diterima pakai selepas mengadakan satu perbicaraan dalam perbicaraan dan keputusan bagi percakapan amaran tertuduh kedua Hakim, Mahkamah Sesyen Pertama belum membuat keputusan kerana perbicaraan dalam perbicaraan masih belum diselesaikan. Permohonan peguambela bagi tertuduh pertama untuk memanggil semula saksi-saksi yang memberi keterangan di perbicaraan dalam perbicaraan untuk percakapan amaran tertuduh pertama tidak dibenarkan oleh Hakim Mahkamah Sesyen Kedua. Kedua-dua tertuduh telah merayu kepada Mahkamah Tinggi di atas keputusan yang dibuat oleh Hakim Mahkamah Sesyen Kedua.

[57] Alasan-alasan bagi rayuan oleh kedua-dua tertuduh adalah secara ringkas bahawa:

(1) Hakim Mahkamah Sesyen Kedua telah tersilap menggunakan budi bicara apabila memutuskan untuk tidak mendengar kes semula (de novo) dalam keadaan kes; dan

(2) selepas memutuskan untuk tidak mendengar kes semula, Hakim Mahkamah Sesyen Kedua telah tersilap lagi apabila tidak membenarkan memanggil semula saksi-saksi yang telah memberi keterangan di prosiding voir dire di mana adalah bertentangan dengan peruntukkan di bawah s 261(b) Kanun Acara Jenayah.

[58] Setelah mendengar hujah-hujah daripada peguambela dan Timbalan Pendakwa Raya, Mahkamah Tinggi dalam kes *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya* [1996] 3 MLJ 298 telah menolak rayuan di atas alasan bahawa:

(1) sebarang perintah yang dibuat oleh Mahkamah Rendah di atas prosedur tidak boleh di rayu di bawah s 307(i) Kanun Acara Jenayah;

(2) Hakim Mahkamah Sesyen Kedua telah menggunakan budi bicara dengan kehakiman apabila memutuskan untuk meneruskan dengan sambung bicara dan;

(3) Hakim Mahkamah Sesyen Kedua telah membuat keputusan yang betul apabila tidak membenarkan permohonan tertuduh untuk memanggil semula saksi-saksi yang telah memberi keterangan dalam voir dire dan keputusan untuk meneruskan kes sambung perbicaraan adalah satu perintah prosedur dan tidak dapat merayu.

[59] Kang Hwee Gee H dalam kes itu berkata bahawa keputusan atau perintah yang dibuat dalam perbicaraan (voir dire) oleh Hakim Mahkamah Sesyen Pertama untuk menerima percakapan amaran tertuduh pertama adalah res judicata dan tidak boleh dibuka dan dibicara semula. Walaupun Mahkamah ini bersetuju dengan keputusan di mana Kang Hwee Gee H berkata 'To interpret s 261(a) without regard for the decision already made in the voir dire would run counter to the doctrine of res judicata as it applied in criminal cases ...' tetapi mahkamah ini dengan segala hormatnya tidak dapat mengikuti kes itu supaya kes sambung perbicaraan diteruskan oleh Hakim Mahkamah Sesyen Kedua di mana kes itu tidak diperintahkan untuk di dengar de novo oleh Hakim Mahkamah Sesyen yang lain di mana Kang Hwee Gee H berkata:

> ... To hear the case de novo would not be the best course to adopt as to a large extent, the ability of the witnesses to recall events may have diminished. Further, it would not be in the interests of justice to adopt that course as it would unnecessarily prolong the trial. I could not therefore find any flaw in the exercise of the sessions court judge's discretion which was not according to reason and justice that merits interference. The trial is being conducted in his court. He would be the person in the best position to assess the direction the trial should take.

[60] Dalam kes *Gunasekaran a/l Buchia v Pendakwa Raya*[1995] 2 CLJ 397, perayu telah didapati bersalah dan disabit dan dihukum di atas kesalahan di bawah s 34A Ordinan Lalulintas 1958. Dalam kes itu, majistret pertama telah mendengar tiga orang saksi pendakwa termasuk penunggang basikal yang terlibat, iaitu ibu simati dan pegawai penyiasat. Pada tarikh sambung bicara majistret pertama telah ditukar dan majistret kedua telah meneruskan dengan sambung perbicaraan kes di bawah s 261 Kanun Acara Jenayah walaupun diberitahu oleh kedua-dua pihak bahawa kes harus didengar de novo di atas arahan YAA Hakim Besar Malaya. Setelah kes diteruskan sambung perbicaraan di hadapan Majistret Kedua pendakwaan telah menutup kesnya. Perayu dipanggil untuk membela dirinya tetapi beliau memilih untuk berdiam diri dan seterusnya didapati bersalah dan dijatuhkan hukuman denda sebanyak RM3,000 atau enam bulan penjara jika gagal dibayar. Sebenarnya perintah bahawa kes disambung bicara di bawah s 261 Kanun Acara Jenayah dibuat oleh majistret kedua walaupun diberitahu oleh peguambela bagi perayu dan pegawai pendakwa bahawa kes ini perlu dibicarakan semula dari awal (de novo). Perayu yang tidak puas hati di atas sabitan tersebut merayu kepada Mahkamah Tinggi terhadap sabitan dan hukuman.

[61] Di Mahkamah Tinggi, dalam keputusan untuk membenarkan rayuan dan mengetepikan sabitan dan hukuman terhadap perayu, Abdull Hamid Embong PK (pada masa itu) berkata:

> Saya bersetuju sepenuhnya dengan pandangan kedua-dua Yang Arif Hakim tersebut dimana pendekatan yang diambil terhadap s 261 KAJ ialah dari sudut yang negatif. Ini bermakna bahawa budibicara yang hendak dilaksanakan dibawah seksyen tersebut hendaklah dilaksanakan sebagai satu pengecualian. Dalam lain perkataan hanya dalam keadaan luar biasa sahaja patut digunakan budibicara untuk menyambung sesuatu perbicaraan yang telah dimulakan

terdahulu oleh seorang Majistret yang lain tanpa mendengar semula saksi-saksi penting yang telah memberi keterangan. Pada pendapat saya keadaan luar biasa tersebut tidak boleh dihuraikan disini secara terperinci. Terpulanglah kepada seseorang Majistret untuk menentukan keperluan untuk sambung bicara atau membicara semula dari awal sesuatu kes itu, berlandaskan kepada fakta sekeliling kes tersebut dengan mengambil kira agar keputusan yang dibuat tidak mendatangkan prejudis terhadap tertuduh. Dalam melaksanakan budibicara ini, seseorang Majistret juga diingatkan kepada kewajipan yang diberi oleh mendiang Laville J dalam kes rayuan *Chong Kwee Hian v PP* [1948] 14 MLJ 191 yang pada pendapat saya masih terpakai. Yang Arif Hakim tersebut menasihatkan:

> 'Section 261, however, gives the Court in my opinion complete discretion in the matter and it is always very highly desirable that judgment should be given in any case by a Magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses.'

Kembali kepada kes dihadapan saya, keputusan Majistret Kedua yang arif untuk menyambung perbicaraan tanpa mendengar semula keterangan saksi-saksi penting yang perlu dinilai, adalah tidak tepat berdasarkan prinsip-prinsip yang telah dihuraikan dalam keputusan kes-kes yang disebutkan di atas.

Apabila Majistret yang arif mengambil alih kes ini, hanya tiga orang saksi selesai memberi keterangan. PW1 ialah pegawai polis yang menerima laporan, seorang saksi formal. PW2 ialah saksi utama yang terlibat dalam kemalangan yang mengakibatkan kematian anaknya. PW3 ialah pegawai penyiasat, seorang saksi penting. Pada pendapat saya untuk merakam semula keterangan PW2, seorang pemastautin tempatan dan juga PW3 tidak menimbulkan apa-apa masalah. Malahan, bagi kes ini, oleh kerana keterangan PW2 merupakan tunjang kepada keputusan Majistret yang arif, maka keperluan bagi beliau mendengar semula keterangannya serta melihat dan menilai PW2 sendiri adalah sangat penting dan kegagalan berbuat demikian, pada pandangan saya telah mendatangkan prejudes kepada perayu. Tambahan pula PW2 dan PW3 bukan hanya saksi-saksi formal yang mana keterangan mereka tidak perlu didengar dan dinilai oleh Majistret yang arif (sila lihat *Mohamed Idris Bin Haji Mohamed Said v R* [1949] 15 MLJ 31). Memandangkan bahawa terdapat beberapa kepincangan dalam keterangan PW2, dan kegagalan Majistret yang arif untuk mendengar semula keterangannya supaya dapat dia membuat penilaian secara peribadi, saya telah memutuskan bahawa perayu tidak seharusnya dipanggil untuk membela dirinya.

[62] Dalam kes *Bhaskar @ Prabaskar & Ors v State represented by Inspector of Police, Vellore Taluk Police Station* [2000] 2 LRI 803, fakta-fakta secara ringkas adalah seperti berikut:

Perayu dalam kes itu telah dihadapkan di Mahkamah Khas (designated court) di Madras (sekarang dipanggil Chennai) yang ditubuh di bawah 'Terrorist and Disruptive Activities Prevention) Act 1987 (*TADA*). Perayu juga dituduh untuk kesalahan di bawah s 302 dibaca dengan s 120B IPC (Kanun Kesiksaan India) dan di bawah s 4 Tamil Nadu Public Property (Prevention of Damage and Loss) Act 1992, selain dari ss 3 dan 5 *TADA*. Dalam pada masa perbicaraan diteruskan perayu telah memberi jaminan dan beliau dibebaskan di atas perintah jaminan. Kemudian *Pendakwa Raya*telah menarik balik pertuduhan di bawah TADA dan Mahkamah Khas (designated courts) di bawah TADA di Negeri Tamil Nadu telah tutup. Di atas sebab itu, kes-kes di bawah pertuduhan-pertuduhan lain telah dipindah kepada Mahkamah lain (Additional Sessions Judge) Vellore (Tamil

Nadu) untuk dibicara. Mahkamah Sesyen tersebut bercadang untuk meneruskan dengan perbicaraan dari peringkat di mana Mahkamah Khas (designated court) telah berhenti dan guna pakai keterangan yang telah dicatat oleh Mahkamah Khas (designated court) sebagai keterangan untuk kes-kes lain. Perayu telah membantah dan meminta kes didengar semula (de novo). Permohonan oleh perayu ditolak oleh Mahkamah Sesyen. Perayu telah memohon kepada Mahkamah Tinggi di bawah s 482 Kanun Prosedur Jenayah 1973 (India) dan bergantung kepada kes *Niranjan Singh Karam Singh Punjabi v Jitendra Bhimraj Bijja* AIR 1990 SC 1962 dan memohon kes didengar semula (de novo). Mahkamah Tinggi berpendapat bahawa Mahkamah Sesyen tidak semestinya memerintahkan supaya kes didengar semula (de novo) di atas peruntukkan di bawah s 326 Kanun Acara Jenayah 1973. Seksyen 326 Kanun Prosedur Jenayah 1973 berkata:

> 'Whenever any judge or magistrate after having heard and recorded the whole or any part of the evidence in any inquiry or a trial, ceases to exercise jurisdiction therein and if succeeded by another judge or magistrate who has and who exercises such jurisdiction, the judge or magistrate so succeeding, the judge or magistrate who has and who exercises such jurisdiction, the judge or magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.
>
> Provided that if the succeeding judge or magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, if any as he may permit, the witness shall be discharged.'

[63] Perayu tidak puas hati di atas keputusan Mahkamah Tinggi dan merayu kepada Mahkamah Agong. KT Thomas H bagi Mahkamah Agong berkata:

> The archaic concept was that the very some judicial personage who heard and recorded the evidence must decide the case. That concept was in vogue for a long time. But over the years it was revealed in practice that fossilisation of the said concept, instead of fostering the administration of criminal justice, was doing the reverse. Very occasionally judicial officer of one court was changed and was replaced by another. As evidence had to be recorded afresh by the new officer under the old system, witnesses who were already examined in the cases at the cost of considerable strain and expenses — not only to them but to the exchequer — were re-summoned and re-examined. The litigation cost thereby inflicted on the parties used to sore up. The process would have to be repeated over again if such next judicial personage also was changed. Eventually it was learnt that the object sought to be achieved by such repetitions, when compared with the enormous cost and trouble, was not of so much utility. Hence the legislature wanted to discontinue the aforesaid antediluvian judicial officer. The legislature conferred such option only to the magistrates at the first instance and at the same time empowered them to re-examine the witnesses already examined if they considered such a course necessary for the interest of justice. As the new experiment showed positive results towards fostering the cause of criminal justice and Law Commission recommended that such option should advisedly be extended to judges of all other trial courts also.

The Law Commission in its 41st Report recommended thus:

> 'It is obviously desirable that in the serious cases the whole evidence should be heard by the judge who finally decides the case. However, having regard to the realities of the situation, it is necessary to make some provision for cases where such transfers do take place, because a mandatory provision for a de novo trial may often cause considerable inconvenience and hardship. We, therefore, propose to extend the section to judges of sessions courts by referring to judges of sessions courts by referring to judge or magistrate `instead of magistrate' only.'

The aforesaid recommendation was later accepted by the government and was finally approved by the Parliament through s 27 of Act 45 of 1978.

Thus the judge of the designated court is it effect a sessions judge, his powers are those of a sessions judge and the procedure to be followed by him is that of a trial before a court of sessions. In such a situation when the judge of designated court ceased to have jurisdiction on account of abolition of that court, the sessions judge to whom the case is transferred for trial of the offences charged (after dropping out the offences under TADA) must be regarded as a successor judge. It is immaterial that such successor judge cannot try the offences under TADA or that in the trial before a designated court certain items of materials could be admitted as evidence which could not get such admission in the trial before regular criminal courts.

A contrary interpretation would lead to unwholesome repetition of the entire exercise involving considerable cost to the exchequer, financial strain to the accused and waste of time of the courts. Greater than all those, it would inflict untold inconvenience to the witnesses who are the innocent parties in the case. The court cannot afford to be oblivious to the reality that no witness is, on his own volition, desirous of going to the court for remaining there until his turn is called to mount the witness stand and to undergo the agony of facing grueling questions. He does it as he has no other option when summoned by the court. Most of the witnesses can attend the courts only by bearing with all the inconveniences to themselves and at the cost of loss of their valuable time. When any witness had already undergone such agony once in connection with the same case, no effort to save him from undergoing that agony once again for the very same case should be spread, unless such re-summoning is absolutely necessary to meet the ends of justice.

On the contrary, no prejudice would be caused to the accused as he can invoke the powers envisaged in the proviso to sub-s (1) of s 326 of the Code. If the successor judge is of opinion that further examination of any witness, whose evidence has already been recorded is necessary in the interest of justice, the judge would re-summon such witness either for further examination or further cross-examination and re-examination. When such a course is permitted by law there can be no possible grievance for the accused that prejudice would be caused to him if the evidence already on record is treated as evidence in the case.

We therefore concur with the conclusion arrived at by the trial court which has been confirmed by the learned single judge of the High Court. This appeal is accordingly dismissed.

[64] Dalam kes *Bhaskar @ Prabaskar & Ors v State represented by Inspector of Police, Vellore Taluk Police Station*, Mahkamah Agong berpendapat bahawa apabila Mahkamah Khas (designated court) tidak mempunyai bidang kuasa untuk bicarakan pertuduhan (di mana Mahkamah tersebut telah pun ditutup), kes itu harus dipindah kepada Mahkamah yang

mempunyai bidang kuasa walaupun Mahkamah Khas (designated court) telah mengambil perhatian (cognizance) pertuduhan tersebut. Mengikut s 18 TADA apabila kes itu dipindah kepada Mahkamah yang mempunyai bidang kuasa, Mahkamah tersebut mempunyai kuasa untuk meneruskan dengan perbicaraan dan Mahkamah Sesyen tersebut boleh meneruskan kes dari peringkat di mana Mahkamah Khas (designated court) telah mula dan meneruskan kes. Di atas alasan-alasan tersebut, Mahkamah Agong telah menolak rayuan oleh tertuduh.

[65] Dalam kes *Maleb bin Su v Public Prosecutor; Cheak Yoke Thong v PP* [1984] 1 MLJ 311, kedua-dua pemohon telah memohon di Mahkamah Rendah bahawa seorang Presiden Mahkamah Sesyen dan seorang Majistret menarik diri (disqualify) dari meneruskan kes di atas alasan-alasan bahawa Presiden dan Majistret adalah dari satu perkhidmatan di mana Peguam Negara adalah Ketua Suruhanjaya Perkhidmatan Kehakiman dan Perundangan. Juga Peguam Negara adalah *Pendakwa Raya*dan mempunyai supervision dan control bagi Pegawai Kehakiman. Oleh itu ada kemungkinan (likelihood) bias. Permohonan tersebut telah ditolak oleh Mahkamah Rendah dan rayuan dibuat kepada Mahkamah Tinggi terhadap keputusan tersebut. Hashim Yeop A Sani HMP (pada masa itu) yang menolak rayuan berkata:

> Finally, what is the 'system' which counsel said they fear would produce a likelihood of bias? The judicial and legal service is one of the public services mentioned in Article 132(1) of the Federal Constitution. The authority which exercises jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission established under Article 138 of the Constitution of which the Attorney-General is only a member. *There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution. An officer belongs to the judicial and legal service but he may serve in various different capacities in the Judicial Department and Legal Department. As normal in the administrative set-up of the public service each department has its own head. And the Attorney-General is not the head of the Judicial Department. Thus looking at the legal and administative framework governing the service I do not think the facts here warrant a conclusion of a real likelihood of bias.* If such a conclusion is made it is not the sort of conclusion which in my opinion right thinking persons armed with the proper information and advice would entertain. (Penakanan ditambah.)

[66] Kes *Maleb bin Su v PP; Cheak Yoke Thong v PP* telah dirayu kepada Mahkamah Persekutuan (lihat kes *Cheak Yoke Thong v PP* [1984] 1 CLJ (Rep) 87). Dalam kes itu, Salleh Abas KHN berkata:

> The law on bias which disqualifies an adjudicating officer from an adjudication is summarised in Latin maxim *nemo debet esse judex in propria causa*, meaning no one should be Judge in his own cause. This time-honoured principle is based on the desirability of maintaining public confidence and respect in the administration of justice. Thus, no one who is himself a party to the proceedings or who has any direct pecuniary interest in the result is qualified to adjudicate in those proceedings. But the Court will not disqualify him merely because of his words, deeds or his association with a party who is instituting or defending the proceedings before him unless the circumstances of the case show that there is a real likelihood or reasonable suspicion of bias. (*de Smith's* (4th Ed) p 251).

In this case it is clear that Encik Zaini, the Magistrate, has no pecuniary interest or personal gain to benefit from the trial of Cheak. He was not concerned with the outcome of the trial as to whether the prosecution will succeed or fail. He was there to do a job and to hold a trial in accordance with the established procedure and evidence. Thus, there cannot be any bias at all.

What about the Attorney-General being the head of the Judicial and Legal Service? Would this fact and his position vis-a-vis members of Service per se constitute a legal bias?

The learned Judge who heard the appeal held that the Attorney-General is not the head of the Judicial and Legal service and that it is not his decision alone which decides on the fate of the Magistrate's career in the Government service because the Magistrate together with all the other officers in the Judicial and Legal Service including the Attorney-General himself is under the jurisdiction of the Judicial and Legal Service Commission. We see no reason to disagree with the opinion so expressed.

We wish, however, to add that even assuming that the Attorney-General is the head of the Service, a term which is not known to the Constitution but conveniently used in the public service sector for administrative expediency, under no circumstances could the Magistrate be held to be under the Attorney-General, nor could he be said to be a party to the prosecution. The Magistrate is not appointed by the Attorney-General but appointed by the Ruler of the State (or in the case of Federal Territory by Yang di-Pertuan Agong) on the advice of the Chief Justice to whom the Magistrate is responsible and under whose administrative control he is placed (See ss. 78 and 79 of the Subordinate Court Act). His transfer from one judicial post to another judicial post is completely under the authority of the Chief Justice, and as regards his transfer from a judicial post to a legal post under the aegis of the Attorney-General, this is a matter of consultation and agreement between the Chief Justice and the Attorney-General. Similarly, as regards his promotion and advancement in the Service, the confidential report on the Magistrate for this purpose is written by a Judge of the State where the Magistrate is currently or previously posted and this report is subject to the comments or recommendations by the Chief Justice for the ultimate consideration of the Judicial and Legal Service Commission. All the members of the commission are Judges including the two Chief Justices (of Malaya and Borneo), except for the Chairman and the Attorney-General, the Chairman being the Chairman of the Public Service Commission. Thus, under no circumstances could it be said that the Magistrate is under the influence of the Attorney-General and therefore part of the prosecution so as to give ground to any one to infer the so-called 'inherent or legal' bias as opposed to factual bias.

The Attorney-General today is a civil servant. He belongs to the Judicial and Legal Service and being the highest paid officer in the Service it is natural that he assumes the leadership in the Service and is thus referred to as head of the Service for better or for worse. But this fact alone does not create an 'inherent or legal bias' which Cheak wants the Magistrate to disqualify himself from hearing his case. Whether one likes it or not the present position of the Attorney-General in the system of criminal justice is perfectly in accord with the law and the Constitution. Being a member of the judicial and Legal Service, the Attorney-General is a civil servant, and holds office — just as other officers and Magistrates do — during pleasure of the Yang di-Pertuan Agong, meaning his appointment is terminable by the Yang di-Pertuan Agong and his service is terminable by the Commission subject to the safeguards provided for in the Constitution. These

facts are all the legal and constitutional realities and we cannot see how a situation which is firmly established by law and Constitution can be said to be a legal bias.

As regards actual or likelihood of bias, the learned Magistrate said in his grounds of judgment that although he feared the Attorney-General, he gave an assurance that he would never give in to the Public Prosecutor's convenience and that he would decide the case according to its merits and do justice according to the rule of law. We see no reason not to accept his assurance, unless he did not mean what he said. After all the fear that he entertained is a self-induced and misguided fear. There is no reason at all for him to be afraid. In fact when we look at his judgment, we are left in no doubt that the Magistrate was a courageous person especially when he revealed his dissatisfaction and that of his colleagues and the low morale in the Judicial and Legal Service. To have alleged that the Attorney-General is responsible for this state of affairs and usurping powers requires a person of very great courage indeed.

Magistrates and Presidents and other officers in the Judicial and Legal Service may have certain views and feelings towards their service, and that is natural, but such views and feelings are completely a domestic affair between them and those who have to run the service. No one should be allowed to take advantage of it especially to exploit it in the Court of law to stop a trial. Nor should the Magistrates allow themselves to be used by others for the purpose. We think the judgment of Hashim Yeop A Sani FJ should have laid the matter to rest. To continue raising the issue in this application only serves to create and continue the suspicion in the minds of the innocent public that there is no fair trial in the Subordinate Courts in this country because of the position of the Attorney-General vis-a-vis the legal and judicial officers. This, in our view, is highly mischievous and irresponsible. In fact the brunt of the criticisms levied against the Courts' rulings in refusing disqualification are directed against the Attorney-General personally. Such tactic is to be deplored because the Court is neither a forum to advocate changes in the appointment of officers of the realm nor even changes in the law. Whilst Counsel has every right to urge any submission on behalf of his client and he can do so without fear or favour, certainly that right is not an absolute one. It must be limited in terms of honesty, sincerity, propriety and decency. It is certainly an abuse of process to make an innocent Magistrate, raw and inexperienced, a mere pawn with which attacks on the Attorney-General are mounted. Early trial is what our system of criminal justice is striving for. Yet how is this application going to help achieving it? From the records the case is already five years old. Thus, it appears that not only the Magistrate but also the accused have been used to further the interests of those who have disagreement with the Attorney-General. This is serious and we only hope that our impression of abuse of process is not true.

Reverting to the law, even if the current system of appointment of Magistrates and Presidents of Sessions Courts and the appointment of Attorney-General and other officers is regarded as defective and not conducive towards impartiality in the administration of justice (which, in our view, is far from being so) until it is changed, the system must go on. If the submission of Cheak is accepted it will mean that all Magistrates and Presidents of Sessions Courts in this country will have to disqualify themselves from hearing any criminal prosecutions at the suit of the Public Prosecutor. Such a situation will cause a failure of justice as the whole administration of justice in the Subordinate Courts will come to a standstill. The law will not be so powerless as to allow the situation to develop. The doctrine of necessity can always be invoked to prevent it from happening. Just as ex necessitate the Yang di-Pertuan Agong is authorized by the Constitution to declare a state of

emergency when he is satisfied that an emergency situation exists, similarly ex necessitate the Magistrate is competent and obliged to adjudicate even though he is prima facie disqualified for interest or bias, if declining to do so, would lead to failure of justice. There are many cases and instances in other common law jurisdictions in which the doctrine of necessity was successfully invoked and applied. To quote as an example, the Judges of Saskatchewan were told to be under an obligation ex necessitate to Judge upon the constitutionality of a legislation rendering them liable to pay income tax on their salaries. (*The Judges v Attorney-General for Saskatchewan* [1937] 53 TLR 464). But the doctrine must not be used to camouflage an arbitrary power. While it can be invoked to prevent failure of justice it must not be used as an affront of justice. This means that so long as the trial or adjudications is held in accordance with the recognized procedure which is designed to achieve impartiality and fair trial, no disqualification ex necessitate can vitiate that trial. (*de Smith* (4th Ed) pp 251 and 276).

In our system not only is there room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. We, therefore, see no substance in this application. There is, however, one other matter we would like to comment here, and that is this: The filing of this application to the Federal Court was accompanied by such a fanfare in the local newspapers (please refer to *The Star* dated 10 April 1984) that we cannot help concluding that the details of the case reported in the press could not be otherwise than the result of prior interview between the solicitors and newspaper reporters. We view this very seriously as the practice only serves to mislead the public and also embarrasses the Court. In this case it was in the press that the several questions were posed for the Federal Court's determination whilst the application was not yet brought to our attention. We think lawyers should refrain themselves from briefing the press on matters pending before the Court, especially when they have not been properly before it. We would like to remind them of rr 45, 46 and 47 of the Legal Profession (Practice and Etiquette) Rules 1978, which seem to us to be relevant in the circumstances of this case. We hope that the rules are not dead letters.

Our answer to the question is in the negative and we order that the trial must commence without further delay. (Penekanan ditambah.)

[67] Dalam kes *Coleshill v Lord Mayor, Aldermen and Citizens of the City of Manchester* [1928] 1 KB 776:

Jan 23. The following written judgments were delivered:

SCRUTTON LJ [after stating the facts, proceeded:] This case was heard under melancholy circumstances. Mr. Justice Fraser, who began the case on Thursday, July 7, and had heard three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr Justice Acton was sent down from London on the Sunday and, having read Thursday's shorthand notes, at the urgent request of the parties continued the case with the same jury on Monday, the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner.

[68] Dalam kes *In Re Application Of British Reinforced Concrete Engineering Co., Limited* The Times Law Reports, Friday, January 25, 1929:

This was an application for directions as to the further hearing of the abovenamed case.

MR WROTTESLEY KC, who (with Mr W Lyon Wood) appeared for the applicants, the British Reinforced Concrete Engineering Co, Limited, said that at the time of the death of Mr Justice Salter the case had been partly heard before the Commission, Mr Justice Salter presiding. It had been heard for four days, during which he (the learned counsel) had called his evidence, and a preliminary point had been taken by Mr Bruce Thomas, KC, who, with Mr Alfred Tylor, appeared for all the respondent railway companies. Both counsel had at the date of the death addressed the Court on the preliminary point, but there had been no reply.

By the consent of all parties, Mr Wrottesley continued, it was suggested that the learned Judge, Mr Justice MacKinnon, should read through the shorthand notes of the evidence that had been taken and then consult with his colleagues. The Court should then be addressed again on the preliminary point by both counsel. He must, however, draw the attention of the Court to the observations of Lord Justice Scrutton in *Coleshill v Manchester Corporation* (44 The Times LR, 258: [1928] 1 KB, 776, at p 786), where he said, commenting on the procedure adopted in a case which had been partly heard before Mr. Justice Fraser at the time of that Judge's death: 'I doubt whether a Judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another Judge, it not being a case of evidence being taken on commission or before an examiner.

MR JUSTICE MACKINNON said that the Commissioners thought the course suggested by the parties should be adopted. The dictum of Lord Justice Scrutton was directed to a case heard before a jury, where there was a conflict of evidence. They could see no objection in this case to the procedure proposed by the parties.

[69] Dalam kes *Bolton v Bolton* [1949] 2 All ER 908, Lord Merriman berkata:

… The case was begun before one metropolitan magistrate and finished before another. Mr Wightwick heard, in substance, the whole of the wife's evidence in chief on May 25, evidence setting out in detail and more or less in chronological order the story of the assaults of which she complained. To put the matter at the very lowest, it is a very grave disadvantage to anybody who has to give a decision in such a case not to have been able to judge the demeanour of the complainant wife while she was giving her own story. Everything that has been said about the advantages of seeing and hearing the witnesses, as against an appellate tribunal which only reads evidence on paper, applies a fortiori to a court which only reads the principal evidence on paper and hears the rest of the evidence **viva voce**. I think it is necessary to speak plainly. I know that both parties consented to the evidence, which represented the best part of a day's hearing, being read over to Mr Rose, the magistrate who took up the case, and to the wife saying in the witness-box: 'That evidence is true.' It still remains the fact that Mr Rose never heard her give her evidence in chief. He heard a very slight addendum to her evidence in chief and one not of great importance, and he heard her cross-examination and the rest of the evidence, including the evidence of a neighbour called on her behalf and the

evidence of the husband. He found that the acts complained of by the wife amounted to persistent cruelty. About that there cannot be any dispute because, if the facts were proved, it is a perfectly clear case of persistent cruelty, but it remains that the magistrate was contrasting the evidence of the husband with that of the wife which had only been partly heard by him.

It must be said plainly that this was a wholly irregular proceeding and ought not to be repeated. Everyone can understand the temptation to make a short cut like this, but, particularly in a case which is going to depend on the conflict between the two principal witnesses, it is essential to remember the commonplace that it is important not merely that justice should be done but that it should manifestly be seen to be done …

The whole emphasis is on the absence of any conflict of evidence. In the present case the evidence which was read was that of the principal witness herself who was, in every single detail, in direct conflict with the witness who was going to be called, her husband. That is almost more directly in point than a case where there is a jury, as in *Coleshill v Manchester Corporation*, because the jury remained the same throughout, and the change was only on the bench. It is manifestly an immaterial circumstance whether the change in the tribunal is brought about by death or illness. When the magistrate or judge, as the case may be, is the judge of both fact and law, it is, to quote the words of Scrutton LJ, 'a precedent which should not be followed,' at any rate, where there is the slightest risk of any conflict of evidence.

[70] Walau bagaimanapun, mahkamah ini ingin menyatakan bahawa kes-kes tersebut di atas harus dibezakan apabila berbanding dengan latar belakang dan keadaan kes di hadapan mahkamah ini kerana dalam kes-kes yang dinyatakan di atas tidak menyatakan atau merujuk kepada sebarang peruntukan dari segi undang-undang atau garis panduan tentang kes yang didengar lebih daripada seorang majistret atau hakim seperti peruntukan di bawah s 261 Kanun Acara Jenayah di kes di hadapan mahkamah ini.

[71] Di atas fakta, latar belakang kes dan keadaan mahkamah ini berpendapat bahawa majistret kedua tidak menggunakan budi bicara dengan kehakiman supaya sebahagian saksi-saksi dipanggil semula untuk memberi keterangan sama ada diperiksa atau diperiksa balas atau mendengar hujah-hujah khususnya berkenaan dokumen-dokumen yang ditanda sebagai ID.

[72] Dalam kes *Chua Chee Chor v Chua Kim Yang & Ors* [1960] MLJ 127, Thomson CJ berkata:

The case had an unfortunate history. It came on for hearing in October, 1954, before a Judge who heard all the evidence but who reserved judgment and was then obliged on medical grounds to retire before he could give judgment. In these unfortunate circumstances the normal course would have been for the case to be retried de novo. This, however, would have involved considerable expense and in the event the parties asked that Neal J, should decide the case on the evidence as recorded by his predecessor.

For myself I have grave doubts as to the regularity of this course, particularly as there was a great deal of conflict of testimony in the case. It is only fair to say that Neal J, had considerable doubts himself. On the other hand the case can be distinguished from the English cases of *Bolton v Bolton, Coleshill v Manchester Corporation* and *Re British Reinforced Concrete Engineering Co Ltd*'s application. In

all these cases part of the evidence was heard by the Magistrate or Judge who commenced the case and part was heard by the Magistrate or Judge who concluded it and gave judgment. In the present case, however, all the evidence was heard by Neal J's predecessor and Neal J, did not see or hear any of the witnesses. The parties themselves agreed to the case being decided on the evidence as recorded by Neal J's predecessor. Before us neither party has taken the point of irregularity and in the circumstances for myself I am not disposed to take the point although I would express my very strong view that the precedent is not one to be followed.'

[73] Dalam kes *Ling Hock Tee v Goh Choon Moi* [1965] 2 MLJ 167, fakta-fakta yang relevan adalah berikut:

Tuntutan plaintif adalah untuk $140.00 berkenaan dengan dua 'hui' transaksi yang terlibat plaintif dan defendan. Pada 9 Oktober 1964 pihak-pihak hadir di hadapan Majistret En Michael Tan dan beliau mendengar keterangan plaintif, dua orang saksi bagi plaintif dan juga keterangan defendan selama dua hari pada 9 Oktober 1964 dan 4 Disember 1964. Kes telah ditangguh untuk sambung perbicaraan. Pada 25 Januari 1965 dan 20 Februari 1965 Majistret lain En Abang Yusof merekodkan keterangan dari dua orang saksi bagi defendan dan memberi penghakiman dan membenarkan tuntutan plaintif. Defendan tidak puas hati di atas keputusan dan merayu kepada Mahkamah Tinggi, di antara alasan-alasan lain, bahawa perbicaraan tidak dijalankan dengan cara adil kerana melibatkan dua Majistret yang lain.

[74] Selepas merujuk dan mengambil kira tiga kes yang lain, iaitu *Chua Chee Chor v Chua Kim Yang & Ors*, *Bolton v Bolton* dan *Coleshill v Lord Mayor, Aldermen and Citizens of the City of Manchester* [1928] 1 KB 776, McGilligan H berkata:

It is to be noted that in all these three cases the parties consented to the judge, or magistrate, who took over half way (or later) through the case deciding it on evidence (in part or 'in toto') not heard by him, but heard and recorded by the first judge or magistrate. In the instant case there was no specific agreement to the change of magistrates; there is nothing on the record to show whether the parties were asked whether or not they agreed to the change, and the probability is that the last magistrate, Abang Yusof, simply proceeded with the hearing begun by Mr. Michael Tan without any thought that the course might not be a proper one.

I am satisfied that in this case, because of the improper and irregular procedure followed, and in all the circumstances, a new trial should be ordered. In fact I go further, it is my opinion and judgment that when a magistrate takes over a case already heard or part heard by another and (without recalling the witnesses already heard, but accepting the evidence recorded by the original magistrate) gives judgment or proceeds to hear further evidence and then give judgment, he has acted without jurisdiction and the purported trial is a nullity. It is, perhaps, just possible that the parties' full and express consent to, or request for, the second magistrate's taking over can give him jurisdiction; I do not have to decide that point here, but would add my word to that of the learned judges already quoted, and say that this course is one which should never be taken.

[75] Hashim PK (pada masa itu) dalam kes *Sia Geok Hee & Ors v Public Prosecutor* [1995] 2 CLJ 841 di ms 845 berkata:

A It would appear from the evidence in the instant case that the appellants requested to recall the prosecution witnesses after their Counsel had discharged himself. However, their application was rejected by the learned Magistrate. Under the circumstances, I hold that the appellants were materially prejudiced when the second Magistrate refused to allow their said application. I therefore set aside the conviction against them by virtue of s 261(b) of the CPC. Any fine, if
B paid is to be refunded.

[76] Oleh kerana, Peguam Negara bukanlah Ketua Suruhanjaya Perkhidmatan Kehakiman dan Undang-Undang seperti diputuskan oleh dalam kes *Maleb bin Su v PP; Cheak Yoke Thong v PP* dan tidak boleh ambil tindakan tatatertib cara peribadi kecuali melalui dan persetujuan oleh
C Suruhanjaya Perkhidmatan Kehakiman dan Undang-Undang, mana-mana pihak tidak perlu bimbang sama sekali bahawa seorang Majistret atau seorang Hakim Mahkamah Sesyen yang ditukarkan ke jawatan timbalan pendakwa raya akan bias kerana pihak-pihak akan bimbang bahawa Pegawai Kehakiman akan berada dalam keadaan ketakutan pada Peguam Negara sebab kononnya beliau adalah Ketua Jabatan Kehakiman. Tuduhan
D atau perasaan seperti ini harus diberhentikan serta merta sebab Jabatan Kehakiman tidak boleh dipengaruhi oleh mana-mana pihak dan saya yakin bahawa Jabatan Kehakiman masih bebas untuk membuat keputusan dalam mana-mana kes yang dibawa ke hadapan Mahkamah.

Sama Ada Surat Bertarikh 25.6.1997 Ditanda Id 27 Yang Dihantar Oleh
E *Perayu Kepada Sp 10 Boleh Diterima Pakai Sebagai Keterangan Terhadap Perayu Dan Sebagai Pengakuan*

[77] Dalam kes *Baharom v PP* [1960] MLJ 249 di ms 250, isu yang sama yang dibangkitkan sama ada surat-surat yang ditulis oleh tertuduh dan dialamatkan kepada simati boleh diterima dalam perbicaraan terhadap
F tertuduh di mana beliau dituduh atas kesalahan bunuh. Thomson KHN (yang memberi keputusan bagi Mahkamah Rayuan) berkata:

As regards the letters written by the accused these were letters in his own handwriting addressed to the person whom he subsequently killed and whatever their bearing on the cause of death (and the trial Judge was at some pains to make it clear that in his opinion they had very little bearing) they clearly were
G admissible for what they were worth and indeed their admissibility was not objected to by the defence at the trial. They were rightly admitted although in our view *they could have had little effect on the trial one way or another in view of what the Judge said in his summing-up to the jury*.' (Penakanan ditambah.)

[78] Dalam kes *Zamzuri bin Nazari v PP* [1995] 4 CLJ 540, pendakwaan
H telah mengemukakan dua surat eksibit P7 dan P8 yang dihantar kepada simangsa dalam tempoh menunggu perbicaraan di mahkamah. Peguambela bagi tertuduh membantah untuk menerima kedua-dua surat tersebut dan menafikan surat-surat itu adalah kepunyaan tertuduh tetapi Hakim Mahkamah Sesyen telah memutuskan untuk menerima surat-surat di peringkat kes pendakwaan. Tertuduh didapati bersalah di atas kedua-dua
I pertuduhan di bawah s 375 Kanun Keseksaan dan dijatuhkan hukuman enam tahun dan lima sebatan untuk kesalahan pertama dan tujuh tahun lima sebatan untuk kesalahan kedua dan hukuman diperintahkan dijalani

berturut-turut. Perayu merayu kepada Mahkamah Tinggi terhadap sabitan dan hukuman. Dalam kes ini, Hakim Mahkamah Sesyen telah menerima kedua-dua surat sebagai satu pengakuan (confession) oleh tertuduh yang dibuat dengan rela hati kepada simangsa.

[79] Chin Fook Yen PK (pada masa itu) telah merujuk kepada dua kes yang ada kaitan iaitu kes *Lemanit v Public Prosecutor* [1965] 2 MLJ 28 dan *Anandagoda v The Queen* [1962] 1 WLR 823 dan berkata:

> Before I proceed to examine the rest of the evidence, I will deal with the admissibility of the exhibits P7 and P8.
>
> Counsel for the appellant referred to s. 31A(1) of the Evidence Act 1950, which reads:
>
> s 31A Admissibility of statements in criminal proceedings
>
> (1) Where in any criminal proceedings, a statement, whether written or verbal, made by any person charged with an offence, is admissible in evidence under or by virtue of any written law, then, notwithstanding anything contained in that written law, such statement shall not be admitted in evidence, or produced in, or considered by, the Court, unless evidence of such statement is given —
>
> (a) by the officer to whom the statement is made; or
>
> (b) by the person charged with the offence.
>
> and submitted that such statements ie P7 and P8 should not be admitted in evidence, or produced in, or considered by, the Court, unless evidence of such statement was given:
>
> (a) by the officer to whom the statement is made; or
>
> (b) by the person charged with the offence.
>
> Since there was no officers involved here and the appellant even denied P7 and P8 as his statements, Counsel for the appellant submitted that it was wrong in law to have admitted them in evidence. The Sessions Court Judge admitted them as evidence on the ground that 'P7 and P8 were conclusively proven by the prosecution that they were written by the (appellant)' and that the appellant was 'the sole author of the letters.' On page 74 of the written judgment the trial Sessions Judge said, 'To my mind, the accused was cunning enough not to write his name or signature on P7 and P8 so as to avoid detection. That was also his motive in not mentioning actual names in those documents.
>
> As regard P8 again the Sessions Judge expressed his view that 'there were some portions that incriminate the accused, I quote:
>
> 'Kakak mungkin tak fikir itu semua… yang lepas itu tetap, lepas. Bagi abah tak ada harapan (1) kerja pun dah berhenti (2) nak masuk pula penjara… Abah akan terima dan sambut cabaran kakak… kalau 7 tahun abah dipenjara 3 tahun kakak di pemulihan… Sebelum apa-apa terjadi itulah abah mahu berpakat dan berbincang dengan cara elok abah tak mahu muka kita atau cerita begini diketahui umum' and 'sebelum terlambat lebih baik kita berbincang. Lagi 2 minggu saja, jangan tinggal 2 – 3 hari baru nak berbincang.'
>
> I am compelled to ask the question whether they amounted, in fact to a confession which implicated the appellant. I pause here to quote what the Chief Justice of Singapore said in the case of *Lemanit v PP* [1965] 2 MLJ 28 — '*In Pika*

Bewa v Emperor [1912] ILR 39 Cal 855 Holmwood and Sharfuddin JJ held that where the only evidence of an offence is a statement by the accused and it is relied on by the prosecution as evidence thereof it must be taken as a whole, and nothing must be read into it which is not contained therein. As they said, `it is all the evidence we have; and when the accused's own statement is to be relied upon, it must be taken as a whole, and nothing can be read into it which is not found within the four walls of the statement.

On the facts of that case it was clear that Pika Bewa administered a drug to her husband which she thought was some charm or love portion to procure the love of her husband. This is all she said in her statement and there was nothing within the four walls of that statement to incriminate her although it turned out on the rest of the evidence that the drug itself was a poison which caused her husband's death.

In *Anandagoda v The Queen* [1962] 1 WLR 823 Lord Guest said:

> 'The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J in *Seyadu v King*, 'The test of whether an `admission' amounts to a `confession' within the meaning of s 17(2) must be decided by reference only to its own intrinsic terms' is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence.

In *Lemanit*'s case the statement reads as follows:

> 'I came from Pulau Langsar, Indonesia. I was arrested by the Indonesian police and taken to Blakang Padang. On arrival there (Blakang Padang) the Indonesian police gave to me a bomb and said that if I did not carry it and explode it in Singapore I would be put in jail for six years. I received the bomb. One of their men, named Hasan followed me to Singapore. He accompanied me to the place where the bomb is to be exploded. If I did not explode the bomb, this man Hasan would report back to the Indonesian police and that I would be shot by them when I returned to Indonesia. I was forced to set fire to the bomb and to throw it at a place where there were no people. For this reason I plead to your Honour to allow me to remain in Singapore because if I go back to Indonesia I will be shot dead.'

On the facts of the case, he clearly admitted in his statement exploding a bomb at a place in Singapore, without reference to extrinsic facts.

Applying this test to P7 and P8 which, I hold, were undoubtedly written by the appellant, without extrinsic facts there was nothing that could implicate the appellant. The appellant's feeling of remorse expressed in P7 and P8, could well be due to the imminent adverse publicity of the impending trial of a case of such a nature. There was nowhere in them, that could be inferred that he admitted

having committed the offence. The overall impression created by P8 tends to show the dreadful consequences that would entail in the event of a conviction. On its intrinsic terms I cannot infer any implication against the appellant. The trial Sessions Judge obviously had been influenced by extrinsic facts, when he referred to the evidence of the complainant and said that 'P7 and P8 could not have referred to other cases since there were no other cases except the present two charges pending against the accused. SP11 also confirmed that this was the only report that she lodged against the accused.

Accordingly applying this test as aforesaid, I also rule P7 and P8 inadmissible in evidence besides s 31A of the Evidence Act 1950.

[80] Setelah menimbang kes-kes tersebut di atas, mahkamah ini berpendapat bahawa sebenarnya majistret kedua tidak seharusnya memberi pertimbangan atau memberi berat kepada surat tersebut.

Kelewatan Oleh Majistret Kedua Untuk Memberi Keputusan

[81] Dalam kes ini, pendakwaan telah menutup kes pada 23 Ogos 2001 selepas memanggil 15 orang saksi dan 4 orang saksi dipanggil semula di hadapan majistret pertama. Majistret pertama telah ditukar ke Jabatan Peguam Negara sebagai timbalan pendakwa raya mulai 1 September 2001. Arahan dari Ketua Pendaftar Mahkamah Persekutuan dikeluarkan pada 18.3.2002 untuk majistret kedua meneruskan dengan perbicaraan. Seterusnya, permohonan oleh peguambela bagi perayu kepada Ketua Pendaftar supaya majistret pertama diarahkan atau dibenarkan untuk mendengar hujah-hujah dan memberi keputusan ditolak oleh Ketua Pendaftar pada 14 Mei 2002. Majistret kedua setelah membaca hujah-hujah bertulis oleh kedua-dua pihak memberi keputusan pada 13 September 2002 iaitu selepas satu tahun di mana tertuduh diperintahkan untuk membela diri. Mahkamah ini berpendapat bahawa dan sebenarnya majistret pertama harus mengambil inisiatif untuk membawa ke hadapan kes ini dan memberi keputusan sebelum beliau melaporkan diri sebagai timbalan pendakwa raya. Banyak masalah telah timbul bagi pihak-pihak, saksi-saksi, tertuduh, peguam dan pendakwaan apabila seorang majistret setelah mendengar semua saksi pendakwaan telah ditukar dan tidak dibenarkan untuk kembali atau memberi keputusan. Masalah ini timbul di atas keputusan yang dengan segala hormatnya dibuat dalam kes-kes separuh perbicaraan di mana seorang majistret atau hakim mahkamah sesyen yang mendengar satu kes jenayah dan kemudian ditukar sebagai timbalan pendakwa raya tidak dapat sambung kes itu. Bagaimanapun mahkamah ini berpendapat dalam keadaan seperti dalam kes ini di mana pendakwaan telah tutup kes selepas memanggil 15 orang saksi dan empat orang saksi dipanggil semula di hadapan majistret pertama dan majistret pertama telah ditukar sebagai timbalan pendakwa raya, Majistret berkenaan seharusnya membawa perkara itu kepada perhatian Ketua Pendaftar ataupun YAA Hakim Besar Malaya supaya langkah-langkah boleh diambil untuk majistret berkenaan dapat selesaikan kes sehingga keputusan diberi atau tarikh melapurkan diri di jawatan baru ditangguh sementara. Langkah-langkah ini akan memberi gambaran atau imej yang baik kepada Jabatan Kehakiman supaya pihak-pihak tidak dapat

tunggu kepada masa-masa yang tidak tertentu sehingga arahan diberi oleh ketua pendaftar bahawa sama ada majistret berkenaan boleh kembali untuk mendengar kes di mana akhirnya atau beberapa bulan kemudian majistret berkenaan tidak dibenarkan balik untuk sambung kes dan majistret yang diganti diarahkan untuk sambung kes. Dalam kes ini, kebanyakkan saksi-saksi yang memberi keterangan pada tahun 2000–2001 diulang bicara ini tidak dapat ingat perkara-perkara yang berlaku pada tahun 1994 dan isu kredibiliti telah timbul dan juga dicabarkan oleh pembelaan. Majistret kedua memberi keputusan berdasarkan kepada nota-nota keterangan yang dirakamkan oleh majistret pertama dan selepas majistret kedua meneliti dan membaca hujah-hujah bertulis seperti diarahkan oleh beliau pada 13 September 2002 iaitu lebih kurang satu tahun selepas pendakwaan tutup kes pada 23 Ogos 2001. Majistret kedua langsung tidak dapat melihat dan mendengar saksi-saksi memberi keterangan di mana empat orang saksi dipanggil semula oleh pendakwaan di hadapan majistret pertama. Mahkamah ini berpendapat bahawa demi keadilan majistret pertama harus diarahkan untuk memberi keputusan sebelum beliau melapurkan diri sebagai timbalan pendakwa raya supaya beliau dapat dan mempunyai peluang menimbang cara saksi-saksi memberi keterangan dan kredibiliti mereka pada masa keputusan dibuat di akhir kes pendakwaan (rujuk kes *PP v Ishak Hj Shaari & other appeals*).

[82] Mahkamah ini mendapati bahawa perkara-perkara seperti dalam kes ini berlaku ulang kali dan beberapa tahun yang kebelakangan ini dan perkara ini harus diberi perhatian serius dan dielakkan demi keadilan oleh Pejabat Ketua Pendaftar atau pihak yang bertanggungjawab khususnya tentang kes yang melibatkan kakitangan kerajaan di mana pendakwaan telah tutup kes dan hanya menunggu keputusan supaya majistret pertama boleh selesaikan tanggungjawab dan tugas beliau sebelum beliau ditukar. Seorang tertuduh tidak harus menghadapi kesulitan, kelewatan dan perbelanjaan yang lebih sebagai perbelanjaan guaman di setiap kes kerana nampaknya terdapat kelemahan di pentadbiran di Jabatan Kehakiman yang boleh memprejudiskan seorang tertuduh seperti dalam kes ini dan akan memberi gambaran yang tidak sihat kepada Jabatan Kehakiman dan salah faham oleh orang awam umumnya.

[83] Mahkamah ini berpendapat bahawa satu tahun untuk memberi keputusan oleh majistret kedua selepas pendakwaan menutup kes di hadapan majistret pertama adalah satu tempoh yang tidak munasabah dan ini telah memprejudiskan perayu dan perayu harus diberi manfaat.

[84] Dalam kes *Tan Hun Wah and another appeal v Public Prosecutor* [1994] 1 MLJ 382 di ms 391, Mohamed Azmi HMA berkata:

> Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of grounds of judgment, an appellate court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial judge's impression on demeanour of witnesses would be

blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course be increased by manifold, when, as in the present case, the trial itself was conducted by instalments over a long period. In this connection, it is relevant to refer to the case of *Ling Ah Hun v PP* (Perak Criminal Appeal No 26 of 1960) referred to in [1960] 26 MLJ October xlv, where Rigby, J said:

> 'But before I leave this case, I desire to draw attention to what I consider the quite intolerable delay in the proceedings before the learned president. The offence was committed on 6 January, 1959, and both appellants were arrested that same day. Thereafter, there were a number of adjournments, primarily because, as it would appear from the record, the prosecution itself at that time was undecided as to whether the case should go for a preliminary enquiry or as to whether it should be dealt with summarily by the learned president. Finally, it was decided that the case should be summarily dealt with, and the trial commenced on 10 June 1959 — five months after the offence had been committed. It was then part heard, and did not continue until 16 July — again, some six weeks later. On the 16 July, the trial concluded and the learned president recorded a conviction. Quite properly, thereafter he adjourned the case in order to obtain a probation officer's report. Proceedings were again heard on 5 August and sentence was passed on that day. Notice of Appeal was at once given that same day, 5 August, and the appellants were released on bail pending the determination of the proceedings. On the notice of appeal being filed it was incumbent upon the learned president to provide his grounds of decision, and for the petition of appeal to be lodged within 10 days after the grounds of decision had been so provided. Those grounds of decision were not supplied until 26 February 1960. It apparently took the learned president six months and 21 days in which to prepare the grounds of decision in this relatively short and simple case. Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice.'

As far as prejudice or unfairness was concerned, there ought to be no distinction in principle between delays in the High Court and the subordinate courts. We would with respect adopt the opinion of Rigby J and hold that in the present appeal, the delay of three years in the supplying the grounds of judgment from the date of filing the notices of appeal was wholly intolerable and made an utter farce of the proper and expeditious administration of justice.

On the facts of the present appeal, we found prejudice had been sufficiently demonstrated from the notes of evidence and grounds of judgment as a result of delays not only in the trial itself but also in supplying the grounds to the appellants or their solicitors. The grounds of judgment was strangely undated, resulting in our inability to determine when the grounds were prepared and signed by the learned judge. Be that as it might, there was no dispute that the document was supplied to the appellants only three years after the filing of the notices of appeal. We were not told of any reason for the delays. In any event, such reason (if any) was irrelevant once the court was satisfied that the appellants had been prejudiced, and the only matter left was to decide how the prejudice could be remedied or mitigated.

[85] Dalam kes *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134 di ms 135, Gunn Chit Tuan H berkata:

Trials before Presidents and Magistrates are meant to be summary trials under the Criminal Procedure Code and to my mind the interests of justice would not be served if trials in the subordinate courts are allowed to continue for many days spread over a long period of time. As it was in this case, a mass of evidence, both admissible and inadmissible, was allowed to creep in so much so that one could hardly see the wood for the trees. It is appreciated that the courts do not have the conduct of the prosecution case or that of the defence, but it would, in my opinion, help to keep out irrelevant evidence and to speed up the hearing of cases in the lower courts if Presidents and Magistrates would at appropriate times during a summary trial ask the prosecuting officer or defence counsel to indicate the relevancy of any evidence which it is proposed to adduce.

After recording over 600 pages of evidence spread over a period of more than a year, one can understand why some time was required to write the grounds of decision. But after a period of eleven months from the date of conclusion of the trial, it was doubtful if the learned President could have remembered the impression which witnesses made upon him. It was held by Terrell Ag CJ in *Chia Han Kiat v Rex* that where judgment was not given until nearly six months later, an appellate court would in such circumstances be in an equally good position to weight the evidence as the learned District Judge himself. In that case the learned District Judge had expressly stated that it was difficult, after many months, to remember the impression which the witness had made upon him. In the case of *Voon Chin Fatt v PP*, the appellate court had no means of discovering whether the delay was in writing the grounds of decision or in despatching them, but Spenser Wilkinson J had this to say about it:

> 'The interval between notice of appeal and delivery of grounds of decision should, in such a case, be a matter of days, not weeks, much less months. Indeed there is a very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. Where delay occurs, not only have important details faded from the mind of the Magistrate who tried the case, but also additional work is involved as the whole case has to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with.'

[86] Mahkamah ini berpendapat bahawa adalah lebih wajar majistret pertama selesaikan kes ini sehingga akhir kes supaya seorang tertuduh sekiranya bersalah (if he is guilty) tidak dilepaskan di atas keadaan, latar belakang dan kelemahan pentadbiran di Jabatan Kehakiman seperti yang berlaku dalam kes ini.

Pilihan Tertuduh Untuk Berdiam Diri

[87] Dalam kes di hadapan mahkamah ini, majistret kedua berpendapat bahawa perayu tidak memberi keterangan apabila diperintah untuk membela diri di mana beliau berkata:

Dengan tidak ada sebarang keterangan dikemukakan oleh OKT bagi menyangkal keterangan pihak pendakwaan maka Mahkamah ini berpuas hati bahawa pihak pendakwaan telah membuktikan satu kes melampaui keraguan yang munasabah terhadap OKT di bawah s 403 Kanun Keseksaan dan dengan itu OKT didapati sabit kesalahan dibawah seksyen yang sama. Timbalan pendakwa raya yang bijaksana juga berhujah bahawa oleh sebab perayu berdiam diri apabila pembelaan dipanggil, mahkamah seharusnya menyabitkan perayu.

[88] Dalam kes *Kumaraguru a/l N Muniandy & Ors v Public Prosecutor* [1994] 2 CLJ 53, Vincent Ng PK berkata:

Thus, in the face of such naked misdirection on the law by the learned sessions court judge, it became incumbent on this court - nay, on this score alone - in the interest of justice, to re-examine the evidence led by the prosecution and to arrive at a fair and just decision.

[89] Dalam kes *PP v Chia Leong Foo* [2000] 6 MLJ 705 di ms 733, Augustine Paul H berkata:

... It cannot be argued that the burden would be on the accused to call Yee Chin Koon as a witness. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other (see *Goh Ah Yew v PP* [1949] MLJ 150; *Abu Bakar v R* [1963] MLJ 288; *Tan Foo Su v PP* [1967] 2 MLJ 19**).** It is not the duty of the defence to fill in any gap in the prosecution case ...

[90] Mahkamah ini berpendapat bahawa dari segi undang-undang perayu mempunyai pilihan dan kebebasan sama ada beliau ingin memberi keterangan atau berdiam diri apabila diperintahkan untuk membela diri dan mahkamah perbicaraan tidak boleh mensabit seseorang tertuduh hanya kerana tidak ada keterangan dari tertuduh dan tertuduh berdiam diri kerana itu adalah hak seseorang tertuduh. Juga, seseorang tertuduh tidak ada sebarang tanggungjawab untuk mengemukakan keterangan pematahan dan mahkamah tidak boleh membuat sebarang inferens terhadap tertuduh sekiranya beliau menggunakan pilihan yang diberi kepada beliau sama ada untuk memberi keterangan bersumpah atau memberi keterangan dari kandang tertuduh atau berdiam diri.

[91] Dalam kes *Goh Ah Yew v PP* [1949] MLJ 150 di ms 153, Spenser-Wilkinson H berkata:

There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.

[92] Dalam kes *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 di ms 142, Abdul Hamid Omar KHN yang memberi keputusan Mahkamah Agong berkata:

Whether the accused testifies or adopts other means is a matter of choice for him and his counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course. Having closely perused the evidence ourselves, we find it difficult to believe that the judicial commissioner's expression is merely a matter of style and language and not of substance. (Penekanan ditambah.)

[93] Dalam kes di hadapan mahkamah, mahkamah ini ingin menyatakan bahawa apabila seorang tertuduh memilih untuk berdiam diri apabila diperintah untuk membela diri dan sama ada ini boleh dikatakan satu risiko yang seorang tertuduh memilih mahupun terdapat keterangan yang mencukupi dan 'overwhelming' terhadap tertuduh adalah berdasarkan kepada fakta suatu kes dan tidak boleh dianggap secara am. Walau bagaimanapun dalam keadaan seperti itu, mahkamah perbicaraan boleh mensabit tertuduh selepas mengkaji semula keterangan yang dikemukakan bagi pendakwaan dan ini adalah berdasarkan kepada fakta-fakta dan latar belakang sesuatu kes dan mengikut undang-undang sebelum pindaan kepada s 173(h) Kanun Acara Jenayah pada 31 Januari 1997 (rujuk kes *Pavone v Public Prosecutor* [1984] 1 MLJ 77 dan untuk kes selepas pindaan kepada s 173(h) rujuk kes *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65.

[94] Di atas alasan-alasan yang dinyatakan di atas mahkamah ini meneliti keterangan yang direkodkan oleh majistret pertama untuk menentukan sama ada satu kes melampaui keraguan yang munasabah telah dibuktikan terhadap perayu. Secara keseluruhan dan keadaan kes ini, mahkamah ini berpendapat bahawa adalah tidak selamat untuk memanggil Perayu untuk membela diri. Di atas keseluruhan keterangan dalam kes ini, di atas fakta-fakta, latar belakang dan keadaan kes ini, mahkamah ini berpendapat bahawa ini adalah satu keadaan di mana Mahkamah ini harus masuk campur di atas keputusan yang dibuat oleh majistret kedua.

Ulang Bicara

[95] Walau bagaimanapun, timbalan pendakwa raya berhujah bahawa sekiranya rayuan dibenarkan dan sabitan diketepikan, satu ulang bicara diperintahkan oleh mahkamah ini. Isu sama ada mahkamah ini harus memerintah ulang bicara mahkamah berpendapat bahawa adalah tidak adil untuk perayu menjalankan perbicaraan kali ketiga kerana perayu telah pun menghadapi perbicaraan sebanyak dua kali di hadapan tiga majistret yang berlainan. Sebelum keputusan oleh majistret kedua seperti dalam rayuan ini, perayu telahpun menjalani satu perbicaraan pada tahun 1999, perayu telah disabit dan dijatuhkan hukuman penjara pada 16.4.1999. Di atas rayuan oleh perayu Mahkamah Tinggi, Ipoh telah perintahkan ulang bicara pada 27 April 2000 (lihat kes Rayuan Jenayah No 41A–1 tahun 1999) di mana sabitan dan hukuman telah diketepikan dan perayu diperintah untuk hadapi ulang bicara di hadapan majistret yang lain. Rayuan oleh perayu dalam rayuan ini adalah terhadap keputusan oleh majistret di atas perbicaraan yang kedua.

[96] Dalam kes *Balasingham v Public Prosecutor* [1959] MLJ 193 di ms 194, Ismail Khan H (pada masa itu) berkata:

> I consider it unfair to the appellant having regard to the unsatisfactory nature of the prosecution evidence to put him to the peril of a retrial.

[97] Dalam kes *Mohd Din v Public Prosecutor* [1985] CLJ (Rep) 582 di ms 588, Gunn Chit Tuan H berkata:

I would respectfully agree with the above dicta of their Lordships in the High Courts of Australia and India and in so far as our present case is concerned I agreed that the appellant did not have a trial in which the relevant law has been strictly followed and has therefore lost a chance which was fairly open to him of being acquitted. The cumulative effect of the various errors in the judgment of the lower Court was that there has been a failure of justice and in the circumstances of the case the appeal should be allowed and the conviction and sentence on the second amended charge set aside. As *nearly four years have lapsed since the commission of the offence, I also did not consider it fair to order a retrial. (R v Saunders [1974] CAR 248)*. The Public Prosecutor's cross-appeal against sentence was also dismissed and I ordered that the fine of RM5,000 and the penalty of RM23,773.50 be repaid to the appellant. (Penekanan ditambah.)

[98] Dalam kes *Zahari bin Yeop Baai & Anor v Public Prosecutor* [1980] 1 MLJ 160 di ms 163, Hashim Yeop A Sani H berkata:

The question left is whether a retrial should be ordered. On the question of retrial the approach was settled in *Rex v Howe* where Morrison CJ said:

'I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly**.** If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.'

It is to be noted also that although the appellants were convicted on 16 April 1976 the trial of both the appellants commenced since 19 October 1973 and the date the offence was alleged to have been committed was 13 January 1973. Under the circumstances *I am of the opinion that the ends of justice do not require that the appellants should be put on trial again. There will therefore be no order of retrial.* (Penekanan ditambah.)

[99] Dalam kes *Ghazali bin Salleh & Anor v Public Prosecutor* [1993] 3 CLJ 638 di ms 646, Abdul Malik Ishak PK (pada masa itu) berkata:

… in the case of *Rex v Howe* (2 MC 109, 110) when he said that:

'I have grave doubt whether the power to order a retrial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.'

[100] Dalam kes *Ooi Lean Chai v Public Prosecutor* [1991] 2 MLJ 552 di ms 554, Mohamed Azmi HMA telah merujuk kepada makna yang diberi untuk perkataan retrial seperti yang ditafsirkan di *The Oxford Companion to Law* by David M. Walker di mana disebut seperti berikut:

A fresh trial of a case. In civil cases tried by jury, if the verdict is set aside on appeal as unjustifiable, a retrial is ordered. In criminal cases a retrial may be ordered where the first trial has in truth been only an apparent trial, having been vitiated by a defect so fundamental as to render it a nullity, and also where the Court of Appeal allows an appeal against conviction only by reason of fresh evidence received or available and it appears to the court that the interests of justice require it, it may order a retrial.

[101] Hashim PK (pada masa itu) dalam kes *Sia Geok Hee & Ors v Public Prosecutor* [1995] 2 CLJ 841 berkata:

> An order for a retrial would not serve the cause of justice and I accordingly make no such order.'

[102] Jeffrey Tan H dalam kes *Lee Kok Nam v Public Prosecutor* [1999] 5 CLJ 283 di ms 293 berkata:

> There is no given yardstick to guide an appellate court as to when it should or should not order a retrial. Ultimately, it is largely dependent on an appellate court's perception of what is the interests of justice of the case before it, and whether the preponderance of justice is against or is in favour of a retrial.'

[103] Abdul Malik Ishak PK (pada masa itu) dalam kes *Ghazali bin Salleh & Anor v Public Prosecutor* [1993] 3 CLJ 638 berkata:

> I consider it to fully unfair to both the appellants, having regard to the unsatisfactory features of this case to put them on to the peril of a retrial.

[104] Mahkamah ini juga telah merujuk kepada kes *Pavone v Public Prosecutor* [1984] 1 MLJ 77 di mana Mahkamah Tinggi yang bersidang sebagai Mahkamah Rayuan telah memerintahkan satu ulang bicara di atas fakta-fakta, keadaan dan latar belakang kes itu. Dalam kes itu, perayu:

(a) hanya menghadapi satu perbicaraan sahaja;

(b) Mahkamah Tinggi berpendapat bahawa ada keterangan-keterangan yang mencukupi (overwhelming) di mana terdapat keterangan-keterangan yang tidak dicabar dan tidak bercanggah (unchallenged and uncontradicted) terhadap perayu yang adalah 'absolutely overwhelming'.

(c) perayu telah memilih untuk berdiam diri apabila beliau diperintah untuk membela diri oleh mahkamah perbicaraan di atas keterangan yang `overwhelming' terhadap perayu;

(d) alasan yang diberi bagi perayu untuk membantah perintah ulang bicara adalah ia akan memberi peluang sekali lagi kepada pendakwaan untuk membetulkan kes di mana pendakwaan gagal untuk membuktikan;

(e) Mahkamah Tinggi berpendapat di atas keterangan yang dikemukakan oleh pendakwaan di mana ianya tidak bercanggah (uncontradicted), mahkamah perbicaraan masih dapat mensabitkan perayu.

[105] Oleh itu, fakta-fakta kes itu harus dibezakan dengan latar belakang rayuan ini di hadapan mahkamah ini.

[106] Dalam rayuan di hadapan mahkamah ini, mahkamah tidak bersetuju dengan permohonan timbalan pendakwa raya yang bijaksana supaya satu ulang bicara diperintahkan sekiranya rayuan dibenarkan, sabitan dan hukuman diketepikan. Mahkamah ini berpendapat bahawa perintah ulang bicara di atas fakta, latar belakang dan keadaan kes ini adalah tidak adil dan munasabah di atas alasan-alasan berikut:

(1) dalam kes ini terdapat dua perbicaraan penuh sebelum ini dan sekiranya satu perintah ulang bicara diperintahkan, ia akan membawa perbicaraan penuh yang ketiga; dan ini akan membawa ketidakadilan (unjust) atau oppressive terhadap perayu;

(2) 10 tahun telah berlalu sejak tarikh kesalahan seperti pertuduhan;

(3) perbelanjaan orang awam akan menambah dan akan membawa kesulitan kepada pihak-pihak berkenaan yang tidak dapat dielakkan dan saksi-saksi akan memberi keterangan kali ketiga dan selepas 10 tahun;

(4) ulang bicara akan mencatat satu distress dan membawa kesulitan kepada 15 orang saksi pendakwaan di mana terdapat satu atau dua saksi yang tidak dapat dikesan pada tarikh perbicaraan kedua;

(5) ulang bicara akan membawa ketidakadilan yang serius terhadap perayu;

(6) kepentingan keadilan tidak memerlukan satu ulang bicara diadakan di atas latar belakang dan keadaan kes ini (rujuk kes *Dyers v The Queen* 210 CLR 285)

[107] Oleh itu, mahkamah ini berpendapat bahawa bukan demi kepentingan keadilan (not in the interests of justice) untuk memerintahkan ulang bicara seperti dipohon oleh timbalan pendakwa raya yang bijaksana.

[108] Di atas alasan-alasan tersebut, di keseluruhan kes, latar belakang dan fakta kes ini, mahkamah tidak memerintahkan ulang bicara terhadap perayu. Dengan itu rayuan dibenarkan, sabitan dan hukuman diketepikan. Perayu dilepas dan dibebaskan.

Rayuan dibenarkan.

Dilaporkan oleh AG Kalidas